CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 641.

M. ANDERSON

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "QUEEN," &c.

No. 642.

N. JORDAN

vs.

THE PACIFIC COAST COMPANY, CLAIMANT OF THE STEAMSHIP "UMATILLA," &c.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JUNE 6, 1911.

(22,717 and 22,718)

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1912.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1850.

M. ANDERSON, Appellant,
vs.
THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

No. 1851.

N. JORDAN, Appellant,
vs.
THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

Upon Appeal from the United States District Court for the Northern District of California.

Causes Consolidated on the Appeal.

Before Gilbert and Morrow, Circuit Judges, and Wolverton, District Judge.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, to the Supreme Court of the United States, under Section 6 of the Act of March 3, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

The libels in the above cases involve the question of the power of a state to make pilotage regulations for certain classes of
2 registered sea going steam vessels when entering and leaving harbors within the confines of the State.

The steamers "Queen" and "Umatilla" were regularly sailing under register and were either on a voyage from the port of San Francisco in the State of California to a United States port on Puget Sound or from a United States port on Puget Sound to said port of San Francisco, but in either such case said vessels did while enroute between said ports of the United States stop at the port of Victoria, B. C., to and from which port of Victoria she did then carry and did then and there deliver and receive both passengers, mail and freight. Both vessels sailed direct to Victoria from San Francisco and direct to San Francisco from Victoria. At least ninety (90) per cent of passengers and cargo was carried be-

tween the United States ports and the parties stipulated that the voyage for which the vessels cleared was between Puget Sound ports of the United States and San Francisco, with the right to stop and trade enroute at Victoria. The stop at Victoria on each occasion was for about an hour. The officers of each vessel had federal pilot's licenses and each vessel was in fact piloted in entering and leaving the port of San Francisco by such an officer. Each of the vessels was tendered pilotage services—the "Umatilla" on leaving port and the "Queen" on entering—by a resident bar pilot of the port of San Francisco, duly commissioned, and acting under the law of the State of California. In each case the tender was declined. The ships refused to pay the pilotage fees imposed by the following sections of the Political Code of the State of California:

"2468. Pilotage and half pilotage. All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code."

"2466. Rates of pilotage at San Francisco. The following shall be the rates of pilotage into and out of the harbor of San Francisco: All vessels under five hundred (500) tons three ($3.00) dollars per foot draught; all vessels over five hundred (500) tons three ($3.00) dollars per foot draught and three (3c.) cents per ton for
3 each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage except where a pilot is actually employed.

"2432. Vessel, owner, etc., liable for pilotage. All vessels, their tackle, apparel and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

On February 28, 1871, Congress enacted an act "for the better protection of persons on vessels propelled in whole or in part by steam etc.", section 51 of which is pertinent to these cases. This section was in 1873 reenacted in sections 4401 and 4444 of the revised statutes. The portions of the section and its subsequent codification on which the court's questions are based are printed in parallel columns as follows:

"An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam."

"SECTION 51. And be it further enacted that * * * every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. * * * Nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as herein provided * * * Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

(The above in a single paragraph.)

Revised Statutes Title LII. "Regulation of Steam Vessels."

R. S. 4401. "* * * and every coastwise sea going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

R. S. 4444. "* * * nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as provided by this title * * * Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State."

The pilots, appellants here, libelled the vessels in the
4 United States District Court for the Northern District of California. The two cases were consolidated for trial in the District Court. It was contended that there was a conflict between the Federal and the State law as to the control of the vessels for purposes of bar pilotage. The libelants relied upon the State law giving the resident state bar pilotage control of the vessels in question when entering or leaving port. The District Court held that the Federal law excluded these vessels from State control and the libels were dismissed.

On appeal to this court it has become apparent that the decision of the two cases involves a question of conflict of jurisdiction between the State and the Federal government as to the pilotage of all steam vessels touching at both foreign and domestic ports on the one voyage and also as to the pilotage of the large number of registered steam vessels now engaged in traffic between ports of the Atlantic

and the Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec and the Isthmus of Panama and around South America. The decision will also affect the very large number of steam vessels which may reasonably be expected to sail between American ports on the Atlantic and the Pacific Oceans, via the Panama Canal.

In determining the intent of Congress in passing the Act of February 28, 1871, the court had under consideration the following statutes: the Act of August 7, 1789, codified in section 4235 of the Revised Statutes, recognizing and adopting the pilotage regulations of the various states so far as bar and entrance pilotage is concerned; section nine, paragraph nine and ten of the Steamship Act of August 30, 1852, creating a certain class of Federal pilots, (10 Statutes at Large, 67, reenacted in chapter 100, sections 18 and 14 of Act of February 28, 1871, (codified in Revised Statutes 4442 and 4438); Act of May 27, 1848, (codified in Revised Statutes 3126), permitting registered vessels sailing between ports of the United
5 States to trade with foreign ports; section twenty of the Act of February 18, 1793, (1 Stats. 313, codified in Revised Statutes 4361), providing for the regulation and duties of officers on registered vessels as to the carriage of foreign goods and distilled liquors and the making of manifests.

The members of the court are unable to agree as to the interpretation of the cited portions of section 51 of the Act of February 28, 1871, codified in Revised Statutes, sections 4401 and 4444, and for this reason, and because of the importance of the interests affected both governmental and commercial, the Circuit Court of Appeals for the Ninth Circuit certify the following questions to the United States Supreme Court, and request its instructions upon them.

1. Are coastwise sea going steam vessels, sailing under register and having officers with federal pilot's licenses, free from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of section 51 of the Act of February 28, 1871, entitled "An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam," as reenacted of date December 1, 1873, in sections 4401 and 4444 of the Revised Statutes?

2. Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise sea going steam vessels sailing under register, whose officers have federal pilot's licenses from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, under the rule of construction laid down in the
last sentence of section 51 of the Act of February 28, 1871,
6 entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam," and as reenacted in section 4444 of the Revised Statutes?

3. Did Congress intend to classify with the "coastwise vessels" referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled "An Act for the Better Security of Life on Vessels Propelled in Whole or in Part by Steam," and reenacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage?

4. Did Congress, in enacting the last proviso of section 51 of the Act of February 28, 1871, reenacted in section 4444 of the Revised Statutes, intend to exempt registered steam vessels whose officers have federal pilot's licenses, from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon proper tender of services of resident bar pilots of the State pilotage establishment, on entering or leaving the port of San Francisco on regular voyages, on which they steamed to Victoria, British Columbia, and carried cargo, mail and passengers direct thereto and direct therefrom; when, after leaving Victoria, British Columbia, on the outward voyage, they steamed to Puget Sound ports of the State of Washington, for which they had originally cleared, and returned therefrom to Victoria, British Columbia, when the stop at Victoria, British Columbia, is for about an hour on each occasion; when at least ninety (90) per cent of the passenger and cargo traffic for the outward and inward voyages is between the port of San Francisco and the ports of Washington; and when the traffic with the foreign port may be deemed en route between the domestic ports?

Dated this 15th day of May, 1911.

(Signed) WM. B. GILBERT,
Circuit Judge.

(Signed) WM. W. MORROW,
Circuit Judge.

(Signed) CHAS. E. WOLVERTON,
District Judge.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit under Section 6 of the Act of March 3, 1891. Certifying Certain Questions to the Supreme Court of the United States. Filed May 15, 1911. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

7 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1850.

M. ANDERSON, Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

No. 1851.

N. JORDAN, Appellant,

vs.

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six (6) pages, numbered from and including one (1) to and including six (6), to be a full, true and correct copy of a Certificate, this day filed by the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions to the Supreme Court of the United States Under Section 6 of the Act of Congress, approved March 3, 1891, in the above-entitled causes, as the original of said certificate remains on file and of record in my office.

8 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

9 [Endorsed:] Nos. 1850 & 1851. United States Circuit Court of Appeals for the Ninth Circuit. M. Anderson vs. The Pacific Coast Steamship Company, a corporation, Claimant, etc., and N. Jordan vs. The Pacific Coast Company, a Corporation, Claimant, etc. Certified Copy of Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Under Section 6 of the Act of March 3, 1891, Certifying Certain Questions to the Supreme Court of the United States.

Endorsed on cover: File No. 22,717. U. S. Circuit Court Appeals, 9th Circuit. Term No. 641. M. Anderson vs. The Pacific Coast Steamship Company, claimant of the Steamship "Queen," &c. File No. 22,718. Term No. 642. N. Jordan vs. The Pacific Coast Company, claimant of the Steamship "Umatilla," &c. (Certificate.) Filed June 6th, 1911. File Nos. 22,717 and 22,718.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 641 and 642.

M. ANDERSON, APPELLANT,

against

PACIFIC COAST STEAMSHIP COMPANY, A CORPORATION, CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, AND FURNITURE, APPELLEE.

N. JORDAN, APPELLANT,

against

THE PACIFIC COAST COMPANY, A CORPORATION, CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, AND FURNITURE, APPELLEE.

MOTION TO ADVANCE.

WILLIAM DENMAN,
Counsel for Appellants.

(22,717 and 22,718).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 641.

M. ANDERSON, APPELLANT,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, A CORPORATION, ETC.

No. 642.

N. JORDAN, APPELLANT,

vs.

THE PACIFIC COAST COMPANY, A CORPORATION, ETC.

MOTION TO ADVANCE.

To the Honorable the Justices of the Supreme Court of the United States:

Now come M. Anderson and N. Jordan, appellants in the appeals from which the questions are certified to this court by the United States Circuit

There is filed herewith the petition of the Attorney General of the State of California, joining in the motion to advance.

Your petitioners therefore respectfully move that the hearing of the certified questions be so advanced that it will be had at this session of the court.

WILLIAM DENMAN,
Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

M. ANDERSON, *Appellant*,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

N. JORDAN, *Appellant*,

vs.

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

To the Honorable the Justices of the Supreme Court of the United States of America:

Your petitioner respectfully represents:

That he is the Attorney General of the State of California; that he has read the certificate of the Circuit Court of Appeals to this Court filed in these causes, and is familiar with its contents; that the decision of the two causes at bar involves a question of conflict of jurisdiction between the State and Federal Governments as to the pilotage of steam vessels touching at both foreign and domestic ports on the one voyage, and is of particular importance to the State of California, as the conflict of jurisdiction involves a large number of registered steam vessels now engaged in traffic be-

tween ports of the Atlantic and Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec, the Isthmus of Panama, and around South America.

The decision will also affect a very large number of registered steam vessels which are confidently expected to sail between American ports on the Atlantic and Pacific oceans via the Panama Canal.

Your petitioner therefore prays that on account of the importance of the interests involved in these causes, the hearing on the questions certified by the Circuit Court of Appeals be advanced on the calendar of this court to the earliest date which the court may deem proper.

And your petitioner will ever pray.

U. S. WEBB,
Attorney General of the State of California.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 641.

M. ANDERSON, *Appellant*,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

No. 642.

N. JORDAN, *Appellant*,

vs.

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

To the Pacific Coast Steamship Company and the Pacific Coast Company, and to Their Proctor, George W. Towle, Esquire:

You, and each of you, will please take notice that M. Anderson and N. Jordan, appellants in the United States Circuit Court of Appeals, appearing here, will, on Wednesday, December 20, 1911, at the opening of court on the morning of that day, move this court to advance the hearing of the above causes upon its calendar; said motion will be based upon the statement of the importance and character of the interests involved as set forth in

the certification from the Circuit Court of Appeals for the Ninth Circuit.

WILLIAM DENMAN,
Proctor for M. Anderson.
WILLIAM DENMAN,
Proctor for N. Jordan.

Receipt of a copy of the within notice is hereby admitted this 13th day of December, 1911.

GEO. W. TOWLE,
Proctor for Appellees in C. C. A.

[Endorsed:] In the Supreme Court of the United States. M. Anderson, appellant, *vs.* The Pacific Coast Steamship Company, etc., appellee. N. Jordan, appellant, *vs.* The Pacific Coast Company, etc., appellee. Notice of motion. William Denman, attorney-at-law, proctor in admiralty. 454 California St., San Francisco, Cal.

Supreme Court of the United States.

OCTOBER TERM, 1911.

M. ANDERSON, Appellant, AGAINST PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "QUEEN," her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 641.
N. JORDAN, Appellant, AGAINST THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "UMATILLA," her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 642.

A motion having been made by the proctor for the appellants to advance the hearing of the above causes, the undersigned, as proctor and counsel for the Pacific Coast Steamship Company and The Pacific Coast Company, the Appellees, respectfully represent to the Court as follows:

These causes come before the Supreme Court on certain questions certified by the Circuit Court of Appeals for the Ninth Circuit. There were involved

in these causes before the Circuit Court of Appeals certain important questions of law other than those stated in the certificate of the Circuit Court of Appeals, which we think should be considered and reviewed by the Supreme Court. We accordingly desire to apply to the Supreme Court for an order requiring that the whole record and cause be sent up to it for its consideration in accordance with the provisions of Section 6 of the Circuit Court of Appeals Act. We have already taken steps in preparation for this motion, the necessary copies of the record required for such purpose by Rule 37 of the Supreme Court having already been shipped by express from California to New York.

The appellees have no serious objection to the advancement of the hearing of these causes, provided that they are still allowed time to make the motion that the whole record and cause be sent up to the Supreme Court for its consideration, and if such motion is granted, to file the necessary papers with the Clerk of the Supreme Court, and thereafter to properly prepare for the argument of the whole case.

Inasmuch as some time may be required for this purpose, we ask that the motion to advance the hearing of the causes be denied at the present time, or that, if granted, the date fixed for the hearing be not earlier than about the middle of February, 1912.

Respectfully submitted,

GEORGE W. TOWLE,
Proctor.

THOMAS THACHER,
GRAHAM SUMNER,
Counsel for Pacific Coast Steamship Company
and
The Pacific Coast Company,
Appellees.

[30488]

In the Supreme Court
OF THE
United States

M. ANDERSON,
Appellant,
vs.
THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship "QUEEN", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
No. 641

N. JORDAN,
Appellant,
vs.
THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship "UMATILLA", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
No. 642

Opening Brief for Appellants—San Francisco Bar Pilots—Covering Both Appeals.

WILLIAM DENMAN,
Proctor for Appellants.

In the Supreme Court

OF THE

United States

M. ANDERSON,

Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship "QUEEN", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Appellee.

No. 641

N. JORDAN,

Appellant,

vs.

THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship "UMATILLA", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Appellee.

No. 642

Opening Brief for Appellants—San Francisco Bar Pilots—Covering Both Appeals.

Preliminary Statement.

This matter is before the Court on a certification of four questions by the Circuit Court of Appeals for the Ninth Circuit. The first three questions concern the interpretation of a single act, Section 51 of the Act of Feb. 28, 1871, "for the better security of life on vessels propelled by steam", in so far as it affects the power of the State of California to charge a fee against the class of long voyaged registered steam vessels for furnishing a resident bar pilot service to such vessels entering and leaving the port of San Francisco.

The fourth questions is practically the certification of the whole case and for that reason and because its answer necessarily follows from the answers of the first three, we have given it but minor consideration in this brief.

Four opinions were written in the cause before the questions were certified, *three of them ignoring entirely Sec. 51 of the Act of 1871* and treating the two sections of the statutes into which it was re-enacted as separate enactments, and without any regard to the history of their origin or to the condition of registered coastwise commerce in 1871, when the act was passed, or in 1873 when it was re-enacted.

We will later consider these opinions more at length, but for the present it is enough to point out that in certifying the questions in the form they have, they have abandoned their treatment of the sections of the Revised Statutes as isolated enactments, and have asked this Court to give its opinion on the original section of the

act "for the better security of life" on steam vessels. This abandonment of the isolated treatment of the opinion and adoption of the historical method, is emphasized by the form of the certificate, where Sec. 51 of the Act of 1871 and 4401 and 4444 of the Revised Statutes are printed in parallel columns (Certificate p. 3) and each other act referred to is the original act, the codification being merely a parenthetical addition (Certificate p. 4).

That the intent of the legislation must be determined by the original act rather than the codification, is an elementary rule of statutory construction repeatedly recognized by this Court.

In *Logan v. United States*, Mr. Justice Gray, speaking for the Supreme Court, after reviewing certain decisions of this Court on original acts of Congress subsequently re-enacted in the Revised Statutes, says:

> "The combination and transposition of the provisions of 1862, 1864 and 1865, in a single section of the Revised Statutes, putting the two provisos of the later statutes first, and the general rule of the earlier statute last, but hardly changing the words of either, except so far as necessary to connect them together, cannot be held to have altered the scope and purpose of these enactments, or of any of them. It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed. Potter v. Third Nat. Bank of Chicago, 102 U. S. 163 (26: 111); McDonald v. Hovey, 110 U. S. 619 (28: 269); United States v. Ryder, 110 U. S. 729, 740 (28: 308, 312)."
>
> *Logan v. United States*, 144 U. S. 263, at 302.

The section of the act to be construed reads as follows:

"An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam."

> "Section 51. And be it further enacted that * * * every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register*, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. * * * Nor shall any pilot charges be levied by any such (State) authority upon *any steamer piloted as herein provided.* * * * Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State." (The above in a single paragraph. Italics ours.) 16 U. S. Statutes at Large p. 455.

The primary matter to be determined by the Court then is, what was the condition of "steam vessel" carriage in the year 1871, first, with reference to the pilotage afforded such vessels when entering or sailing on inland waters (i. e., not "on the high seas") and second, with reference to the reason for a classification of coastwise vessels into those "not sailing under register" (i. e., merely "licensed") and those which are registered. What purpose had Congress in view in limiting the control of the pilots created by the federal authority to those coastwise vessels only which were "not

sailing under register", and when those vessels had left the "high seas" and were crossing the bars and navigating the dangerous narrows and tortuous channels of the bays, rivers and ports of the United States as they were in the year 1871?

It is our purpose to show as a preliminary to the consideration of any of the certified questions—

A. That there are two great classes of pilots in the United States, bar pilots, residential at the bars and entrances to inland waters, in constant and familiar touch with the changing conditions of such waters; and the ships' officers holding federal pilots' licenses, constantly sailing with their vessels, having a general knowledge of such waters but necessarily knowing nothing of changes which have taken place while they were on voyages;

B. That the United States had not in 1871 established any residential bar pilotage system; that it did not then have any laws intended for that purpose, and that it has not as yet created such a system;

C. That the various maritime States of the Union have from the beginning of their organization maintained residential bar pilots for piloting over bars and in inland waters tributary to the high seas;

D. That in 1871 the "*registered*" steamers in the coastwise trade were, as a class, engaged in *long* voyages in the carriage of goods between the Atlantic and Pacific ports of the United States or between the Gulf of Mexico and northern Atlantic ports; while the coastwise vessels "not sailing under register" (i. e., merely

licensed) were engaged in short domestic voyages to nearby ports;

E. That Congress, when it drew the distinction between registered and unregistered (or licensed) coastwise vessels, was drawing the distinction between long voyages and short voyages. It was with a view to the "security of life" on steam vessels that Congress gave the pilotage of the long voyaged registered vessels to the State residential pilots, and allowed only the short voyaged licensed vessels to come in with one of the ship's officers holding a federal license, because his shorter absences from these waters would render him less unfamiliar with the changing conditions of entrance and inland channels.

I.

The Federal Government Had Not Established Any System of Residential Bar Pilotage in 1871 and Has Not Since That Time.

The Act of Feb. 28, 1871, did not create the federal pilotage system so far as it concerns the licensing of pilots. Its provisions add nothing to those of the Act of 1852 (10 Statutes at Large 67). The provisions of the two acts are placed in parallel columns below:

PILOTAGE ACT, 1852:

"SECTION NINTH. Whenever any person claiming to be a skillful pilot for any such vessel (i. e., steam vessel carrying passengers) shall offer himself for a license, the said board (i. e., inspectors) shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, give him a certificate to that effect, licensing him for one year to be a pilot of any such vessels within the limit prescribed in the certificate; * * *

"SEC. 7. * * * The inspectors shall license and classify all engineers and pilots of steamers carrying passengers.

"SECTION TENTH. It shall be unlawful for any person to employ, or any person to serve as engineer, or pilot, on any such vessel who is not licensed

R. S. SEC. 4442:

Whenever any person claiming to be a skillful pilot for steam vessels offers himself for a license the inspectors shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he offers, that he possesses the requisite knowledge and skill and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license."

R. S. SEC. 4438:

"The boards of local inspectors, shall license and classify the masters, chief mates, engineers, and pilots of all steam vessels. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot, on any steamer, who is not li-

by the inspectors, and any one so offending shall forfeit one hundred dollars for each offense; provided", etc. (Act 1852, 10 Statutes at Large 67).

censed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

It thus appears that the laws creating and regulating federal pilotage were in 1871 and *are today* as they were in 1852.

In the early fifties California had created a residential bar pilotage system for the port of San Francisco. Speaking of the system thus created this Court said:

> "The object of the regulations established by the statute, was to create a body of hardy skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or if the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial States has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation not only when the services tendered are accepted by the master of the vessel, but also when they are declined."
>
> *Pac. Mail S. S. Co v. Joliffe*, 2 Wallace 450, at 456.

That case came before this Court in 1864. The question then was, had the Act of 1852 (which was the law in 1871, was codified in the Revised Statutes and is the law today) created a body of pilots to displace the state residential pilotage systems?

This Court in an illuminating opinion held squarely that it had not.

Mr. Justice Field, speaking for the Court, says:

> "The Act (of 1852) contains few provisions relating to pilots; indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were subjects of just praise for their skill, energy and efficiency. The clauses respecting pilots in the Act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors."
>
> "The term 'pilots' is equally applicable to two classes of persons—to those whose employment is to guide vessels in and out of ports, and to those who are intrusted with the management of the helm and the direction of the vessel on her voyage. Abb. Shipp., 195; Bouvier's Law Dic. term Pilots. To the first class, for the proper performance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents and tides, and its bars, shoals and rocks, and the various fluctuations and changes to which it is subject. To the second class, knowledge of an entirely different character is necessary. Yet the Act in question does not require the inspectors, who are to license pilots under its provisions, to possess any knowledge of the harbors for which, under the theory of the plaintiff in error, pilots are to be licensed, or to exact any such knowledge from the pilots themselves. They are to issue their license to a pilot when satisfied, from 'inquiry as to his character and merits', that he 'possesses the requisite skill, and is trustworthy and faithful'. The qualifications thus required may be sufficient for the

pilot of the steamer on her voyage at sea, but are entirely insufficient for the intricacies of harbor navigation.

* * * * * * *

"THE ACT DOES NOT PURPOSE TO ESTABLISH REGULATIONS FOR PORT PILOTAGE: AND WE CANNOT SUPPOSE THAT IN A MEASURE INTENDED TO GIVE GREATER SECURITY TO LIFE CONGRESS WOULD HAVE SWEPT AWAY ALL THE SAFEGUARDS IN THIS RESPECT PROVIDED BY THE STATE LEGISLATURE WITHOUT SUBSTITUTING ANYTHING IN THEIR PLACE.

"Under the Act the ports may be left entirely without resident or local pilots, for it does not require the appointment of such pilots, though the necessity for them must have been obvious. Having omitted this important requirement, the Act omits, of course, all provisions as to the number of pilots, their duties, responsibilities, and compensation. These are matters of the greatest consequence, are contained in all state regulations, and without them no effective system can ever be established."

Joliffe v. Pacific Mail S. S. Co., 2 Wall. 450, at 461, 462, 463.

Nothing new has been added by Congress to the provisions for the federal pilotage establishment up to the present date, much less in 1871, when the provisions of Section 51 were passed in one paragraph of the pilotage act of that year, and in the light of which period the act must be construed.

It is equally significant that in no place in the United States have the federal supervising inspectors attempted to create a residential bar pilotage establishment. In all the districts they recognize, to this day, the local

residential organizations and in this they are but following the Act of 1789 still in force in Revised Statute 4235.

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."
>
> Enacted August 1789, New R. S. 4235.

Furthermore there is no class of men acting as federal pilots, as such, the license being universally taken out by the ships' officers under Section 18 of the Act of 1871 in question (now R. S. 4443).

In construing Section 51 of the Act of Feb. 28, 1871, referred to in the first three of the certified questions, we must then always bear in mind that there was no federal system of bar pilotage at the Hell Gate, at New York (as it then was), in the Schuylkill River and Delaware Bay with its eighty miles of pilotage from the Capes of Delaware to the docks at Philadelphia, in Charlestown Harbor, in Chesapeake Bay, in Mobile Bay, in the forks of the Mississippi leading to New Orleans, in San Francisco harbor (Arch and Blossom Rocks had not then been removed) and at the Columbia River Bar, then without its jetty.

Any classification of vessels made by Congress at this time must be construed with reference to the "security of life" on vessels when they left the high seas and entered these dangerous inland waters. In our next section we will proceed to so construe it.

II.

Congress in the Act of 1871 for the Security of Life Classified Coastwise Steamers Into Those "Registered" and Those "Not Sailing Under Register" Because the Former, as a Class, Were on Long Voyages Where the Federal Pilots on Board Would Lose Touch With Bar and Channel Conditions, and the Latter, as a Class, Were on Short Voyages Where They Would Not.

Under American shipping law, our vessels are classified into two great classes, "registered" vessels which alone may engage in the foreign trade and "enrolled and licensed" vessels which are confined to coastwise domestic voyages or the fisheries.

Parsons on Shipping, page 31.

Very early in the history of our commerce the vessels in the extensive cotton and sugar trade from the cities of the Gulf of Mexico, Savannah and Charlestown to Baltimore, Philadelphia, New York and other north Atlantic ports, found that although their goods were carried almost entirely "coastwise" they would frequently have to stop for various necessities at Havana or some other port of the West Indies. Incidentally some trading was done while in port. The commerce of that time was in sailing vessels, often blown far off their courses. As they were foreign vessels in these West Indian ports they were required to produce a register to comply with the universal maritime law. Their coasting enrollment and license were not sufficient. As early as in the year 1793 registered vessels were allowed to trade coastwise.

This enactment, which still survives in R. S. 4361, was thus the law nearly half a century before Congress created *any* federal pilots.

In other words Congress has from the first recognized the *registered* vessel as of a class sailing on the *longer* voyages, where the vessel is likely to touch at foreign ports.

Such was the condition of the law until the conclusion of the Mexican War and acquisition of California.

On the 27th day of May, 1848, only ten weeks after the treaty of Guadalupe Hidalgo had provided for the annexation of California, Congress enacted a law permitting coastwise vessels, if sailing under register, to touch and trade at foreign ports en route between domestic ports. The provision now (R. S. 3126) reads as follows:

> "Any vessel, on being duly registered in pursuance of the laws of the United States, may engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters and mails. All such vessels shall be furnished by the collectors of the ports at which they shall take in their cargoes in the United States, with certified manifests, setting forth the particulars of the cargoes, the marks, number of packages, by whom shipped, to whom consigned, at what port to be delivered; designating such merchandise as is entitled to drawback, or to the privilege of being placed in warehouse; and the masters of all such vessels shall, on their arrival at any port of the United States from any foreign port at which such vessel may have touched, as herein provided, conform to

> the laws providing for the delivery of manifests of cargo and passengers taken on board at such foreign port, and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed."

The enactment of such a statute at such a time could have had but one purpose in view; the facilitating of commercial intercourse between the Atlantic and Pacific possessions of the United States. To say that Congress then had in mind the San Francisco-Vancouver trade is absurd.

As Congress expected, a very large commerce sprang up between California and these eastern ports whose harbors we have referred to, a trade which was at once *coastwise* and required touching at foreign ports in Central and South America and the West Indies. Many lines of steamers and clipper ships were formed, among them the Pacific Mail Steamship Company, which has survived to this day.

In 1854, when the Panama Railway was under construction, Congress recognized that a part of this Magellan and around the Horn trade would cross the Isthmus. In that year it enacted a statute providing for customs inspectors resident in Panama to inspect the landing and embarking of trans-Isthmian traffic between American ports on the Pacific and the Atlantic which it expressly denominates as "*coastwise*" traffic. The language of the statute is as follows:

> "* * * The Secretary of the Treasury may appoint special sworn agents as inspectors of customs to reside in such foreign territory where such merchandise may be landed or embarked with

power to superintend the landing or shipping of all merchandise, *passing coastwise between the ports of the United States on the Pacific and the Atlantic.*"

Act of March 28, 1854, Ch. 30, 10 Stats. at Large 272, now R. S. 2999.

The growth of the coastwise trade between California and Atlantic ports both around South America and via Panama through the Pacific Mail and other steamship companies is familiar history. Surely no United States Court sitting in admiralty can refuse to take judicial notice of its great proportions.

Its distinguishing features, as far as this case is concerned, are that it was a coastwise trade, *of very long voyages at sea*, and had to be conducted in vessels under register which could touch at foreign ports.

We should then naturally expect to find in the Congressional pilotage laws a separate classification for vesse'ls in this long voyage coastwise trade, where the officers and pilots would become as unfamiliar with bar and channel conditions at the ports they touch at, as they would in voyages to foreign countries.

And we should naturally expect in view of the fact that the federal laws provided for no residential pilotage system, that these vessels would be left to the care of the residential bar pilotage establishments which had been created by the law of almost every maritime State in the Union.

Let us now turn to the first of the certified questions, having in mind the clear distinction between the long

voyages of *registered* vessels in the coastwise trade between the dangerous ports of the Atlantic and Pacific and of the Gulf and the north Atlantic, and the much shorter voyages of the coastwise vessels "*not sailing under register*", whose frequent trips in and out nearby ports made their officers much more familiar with bar and entrance conditions.

III.

The First Question Must be Answered in the Negative.

The first question certified here is as follows:

1. Are coastwise sea-going steam vessels, sailing under register, and having officers with federal pilots' licenses, free from any liability for pilotage fees created by Sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of Section 51 of the Act of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam", as re-enacted of date December 1, 1873, in Sections 4401 and 4444 of the Revised Statutes?

The text of the act referred to in the question is as follows:

> "Section 51. And be it further enacted that * * * every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rule and regulations aforesaid, *not sailing under register*, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. * * * Nor shall any pilot charges be levied by any such (State) authority upon *any steamer piloted as herein provided*. * * * Provided, however, that nothing in this act *shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly

licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

(The above in a single paragraph.)

Now the first important thing to notice is, that Section 51 applies to but a single group of vessels at a certain time of the voyage, namely, "coastwise sea-going vessels" "not sailing under register" and when not "on the high seas". In other words, it has direct reference to the dangerous portion of the voyage, i. e., at the entrance to ports and in inland waters, and it gives control of coastwise vessels to these federal pilots *only* on those voyages on which they are "not sailing under register".

The next important thing is that the State is prohibited from levying pilotage charges only when the "steamer is piloted as herein provided". That is to say, no power is taken away from the State save when the steamer is "not sailing under register", as that is the only provision "herein" for federal pilotage. The statute by its express terms takes no vessel from the control of the resident State pilots in these dangerous waters save in the one contingency provided, i. e., that she has not been sailing on long registered voyages which would make her officers with the federal licenses unfamiliar with their shifting channels and changing conditions due to freshets, alteration of lights, foghorns, etc.

By its express terms, the statute does not affect coastwise steamers sailing under register. By every reason which could concern the "better security of lives" on

steam vessels, they should not have been taken from the control of the residential bar pilots and should not hereafter be, until the federal government has established residential systems at all dangerous ports.

A third matter to be considered is the peculiar wording of the last clause, i. e., "that nothing in this act "*shall be construed* to annul or affect any regulation "established by the laws of any State requiring vessels "entering or leaving a port in any such State other "than coastwise steam vessels to take" a State pilot. The significant thing about this clause is that it does not by its terms remove any vessel from State control, but merely sets a limit as to the class of vessels which shall be *construed* as affected by the act. Its use of the general term "coastwise steam vessels" cannot by any rule of interpretation, enlarge the specific term "coast-"wise sea-going steam vessels *not sailing under regis-*"*ter*". As this clause is directly involved in the second certified question, we consider it more at length in the next section.

It is thus clear that whether we construe Section 51 of the Act of Feb. 28, 1871 on its face alone, or with regard to the history of federal pilotage laws and of the commerce controlled by them, the first certified question must be answered in the negative.

An examination of the authorities shows us that there is nothing in the cases which compels us to adopt any other view.

The Authorities.

It is of great significance that since the case of *Joslyn v. Nickerson*, the first federal case construing the act, in which Judge Lowell says that the coastwise vessel when *sailing under register* is subject to State pilotage laws, not a decision in this or any other Court (that we have been able to find) has questioned the State's right to control the pilotage of all registered steamers, coastwise or foreign. Nor is there even a dictum to that effect in any case construing Section 4401 with which Section 4444 must be construed as to registered coasters. The codified sections of the act have been repeatedly before this Court in cases involving the pilotage of *enrolled* and *licensed* coastwise steamers, and the ruling has been that they are to be controlled by the federal pilots. In nearly every case, however, the distinction has been made between "registered" steamers and those enrolled and licensed and hence "not sailing under register".

Surely with all the tremendous tonnage sailing coastwise under register between the Gulf and Baltimore, Philadelphia and New York, or between the ports on the Atlantic and the Pacific, some one of the great steamship companies would have questioned the State's control of these vessels which the statutes of all these States give to their residential bar pilots. It may be urged that the danger to the steamers entering any one of these ports is so great, when their officers have been for weeks away from them on those long coastwise voyages, that of course their owners are glad to avail themselves of the residential pilots. This however is

but confessing the necessity which Congress must have recognized when it passed the Act of 1871.

In the case of *Joslyn v. Nickerson*, Judge Lowell, after reviewing the history of the federal pilotage laws, says:

> "This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels *not sailing under a register*. Rev. St. 4401; Murray v. Clark, 4 Daly 468, affirmed, 58 N. Y. 684. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. St. 4444." (Italics ours.)
>
> *Joslyn v. Nickerson*, 1 Fed. 133, at 135.

The opinion is significant not only for the conclusion reached but because it makes R. S. 4401 (which embodies the first part of Section 51 of the Act) determine the limitation of the State's power as imposed by Congress, to coastwise vessels not sailing under register.

The case relied on by Judge Lowell was one decided by Chief Justice Daly of New York and affirmed by the Court of Appeals. As this decision is the only one which holds squarely on the subject and as it presents our exact line of reasoning with all the force and clarity of that distinguished Judge, we print it here in full:

> "By the Court.—Daly, Ch. J.—The facts stated in the plaintiff's affidavit were sufficient to warrant a finding that the plaintiff was, within the meaning of the State law of April 3, 1857, §29, the pilot first speaking or offering his services to pilot the vessel. The remaining question is, whether the vessel was a 'coastwise steam vessel,' within the meaning of the 51st section of the United States act of February 28, 1871.

"That section provides that all vessels propelled in whole or in part by steam, when navigating within the jurisdiction of the United States, shall be subject to the rules and regulations established by the United States for the government of steam vessels, and that every coastwise seagoing steam vessel, subject to such rules and regulations, and to the navigation laws of the United States, *not sailing under register*, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. This section further declares that no pilot charges shall, by the authority of any State or municipal government, be levied upon any steamer piloted as therein provided for, and a subsequent provision in declaring that nothing in the act of 1871 shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in that State to take a pilot, expressly excepts 'coastwise steam vessels' from the operation of this saving clause. It follows, from these provisions, that coastwise seagoing steam vessels cannot, by any law of the State, be compelled to take a State pilot upon entering or leaving any port in this State, such vessels being piloted by pilots licensed by the inspectors of steamboats under the law of the United States, it being well settled that this is a matter within the exclusive authority of the government of the United States, if it thinks proper to exercise it; and any law enacted by the general government upon this subject, supersedes the authority of any State law that may be, in whole or in part, inconsistent with it (*Steamship Company v. Joliffe*, 2 Wall. 450; *Cisco v. Rogers*, 36 N. Y. 292; *Sturgis v. Spofford*, 45 Id. 446).

"The question then presented is what is meant in this provision by a 'coastwise seagoing steam vessel', and it appears to me that the section itself gives the explanation by the language 'not sailing under register'. Under the various laws of the

United States, collectively known as the registering acts, vessels obtain their national character by being registered, enrolled or licensed. If under twenty tons, they may be licensed only. If twenty tons or over and they are to be employed in the coasting trade, the whale or the cod fishery, they must be both licensed and enrolled, and the license must be renewed annually (Act of February 19th, 1793, §§ 1, 4, 5) and for any trade or purpose beyond this they are registered (Act of December 31st, 1792). Our laws do not positively require registration or enrollment, but until a vessel is registered or enrolled she is not an American ship. If she engages in the foreign, the coasting trade, or the fisheries, she is liable to forfeiture and as she cannot, without her proper papers, have the privileges of a foreign or an American vessel, her registry or enrollment becomes a practical necessity. When this statute, therefore, refers to a coastwise seagoing steam vessel, not sailing under registry, it must mean one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually; a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. It certainly does not refer to a registered vessel that may trade or sail to any part of the world, as it expressly declares 'not sailing under registry'.

"It appears to have been the design of the act to require steam vessels of this description to be under the control and direction of pilots licensed by the inspectors of steamboats. Making frequent voyages, and sailing in and out of ports upon our coast at short intervals, they are, for the better security of life upon such vessels (Act of February 28, 1871, title and sections 14, 15, 19, 51) required, when under way and not upon the high seas, to be under the control and direction of the peculiar class of pilots provided for by this act; and as these pilots have charge of them when entering or coming out of the ports of this State, there is no occasion for the services of State pilots. To distinguish them from all

other steam vessels, they are, as I have stated, described in the act as 'coastwise seagoing steam vessels, not sailing under registry'.

"The State pilot law of April 24th, 1867, in no way conflicts with the provision of the United States act; the eleventh section of the State law imposing the obligation of taking a pilot licensed by the State board, only upon the masters of foreign vessels, vessels coming from a foreign port, and vessels sailing under registry.

"A coastwise vessel is one sailing by the way of, or along a coast. In a certain sense, the St. Louis was a vessel of this description. For a year previous to the commencement of this suit she was employed as one of a line of steamers running regularly between New York and New Orleans, but was not necessarily limited to running by the way of, or to and from ports upon our coast. She was a registered vessel, and being so, was privileged to go to or stop at foreign ports, and did so. Upon two occasions she stopped at other ports, one being the voyage in question, when she stopped Havana upon her voyage from New Orleans to New York, and when the plaintiff offered his services, she was, in the language of the State law, both a registered vessel and coming from a foreign port, Havana. If she had been an unregistered vessel, the casual circumstance of her stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, would not affect her specific character under the United States act as a coastwise seagoing steam vessel, not sailing under register. But being a registered vessel, she stopped at Havana as she was privileged to do, and for all that appears may have done so not from necessity, but in the course of business. The admission states that upon the voyage in question she was under the control and direction of her master, who was a pilot duly licensed by the inspectors of steamboats, according to the United States act of 1871. I do not think that this affects the question, whether she

was or was not the kind of vessel provided for by that act; for if she were not, she would not become so by the inspectors of steamboats licensing her master as a pilot under the United States act. That was a privilege, office, or right personal to him, which in no way attached to the vessel, if she were not of the description of class required by that act to be under the direction and control of such a pilot, when not upon the high seas.

"The judgment, I think, should, therefore, be affirmed.

"Judgment affirmed."

Murray v. Clark, 4 Daly 468 at 473; affirmed 58 N. Y. 684.

Judge Lowell's and Judge Daly's analysis of the Act of 1871 and its codification, is agreed in by Judge Gilbert, the senior judge in the Court below. As Judge Gilbert's decision disagreed with that of his colleagues, and as it was no doubt chiefly the strength of the position taken by him, which finally led to the certification here, we print the full text of his opinion.

"GILBERT, Circuit Judge (dissenting). The question involved in this case depends wholly upon the construction of sections 4401 and 4444 of the Revised Statutes. In those two sections is to be found the full measure of congressional legislation on the subject of pilotage, and the full extent of the federal delimitation of state power. Section 4361, which appears under a different title, and which subjects registered vessels engaged in the coasting trade to the same regulations, provisions, penalties, forfeitures, and duties as are imposed on licensed vessels in the coasting trade, has no reference whatever to pilotage regulations. This is made plain by referring to the original act of February 18, 1793 (1 Stat. 313, c. 8, §20), in which it specifically appears that the regulations, provisions, duties, etc.,

so referred to concern only the carriage of goods and more particularly distilled liquors, and the duty of masters to make manifests thereof. No new meaning was given to that statute by carrying its provisions into the Revised Statutes as section 4361. 'It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed' (United States v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308), and 'upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology' (McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269). And it is an established canon of construction that, in finding the meaning of a statute in the revision, the courts are permitted to refer to the original statute from which the section was taken to ascertain from its language and context to what class of cases the provision was intended to apply. The Conqueror, 166 U. S. 122, 17 Sup. Ct. 510, 41 L. Ed. 937.

"It is to be borne in mind that, while federal authority over pilotage is paramount to that of the state, the state power does not act by authority delegated by Congress, and the question is, not what has Congress authorized the states to do, but what has Congress taken from the states by its own regulation of pilotage? In Gibbons v. Odgen, 9 Wheat. 207, 6 L. Ed. 23, it was said:

"'Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulations of its pilots in full force in every state. The act which has been mentioned (Act Aug. 7, 1789, c. 9, §4, 1 Stat. 54, re-enacted in section 4235, Rev. St.) adopts this system and gives it the same validity as if its provisions had been specially made by Congress. * * * The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose.'

"In Cooley v. Board of Wardens of Philadelphia, 12 How. 299, 319, 13 L. Ed. 996, the court said:

" 'The act of 1789 contains a clear and authoritative declaration by the First Congress that the nature of this subject is such that, until Congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local, and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.'

"Approaching the question in issue with these principles in mind, it seems clear to me that section 4401 places under the protection of federal licensed pilots, except when on the high seas, all coastwise steam vessels, 'not sailing under register,' and that while section 4444 recognizes the power of the state to regulate pilotage, when entering or leaving its ports, of all vessels other than 'coastwise steam vessels,' the coastwise steam vessels so excluded from state legislation are those and those only which are placed under federal regulation under section 4401, namely, coastwise steam vessels, 'not sailing under register'. Section 4401 is the only federal statute placing vessels under the control of federal pilots while entering or leaving ports, and section 4444, being part of the same statute, is to be construed with it. Both these sections originally appeared as a single section in the act of 1871, entitled 'An act for the better protection of life, etc.' Act Feb. 28, 1871, c. 100, §51, 16 Stat. 455. The field of legislation which Congress might have covered by pilotage regulations comprised three classes of vessels: First, licensed and enrolled vessels engaged in the coasting trade; second, registered vessels engaged partly in coasting trade and partly in foreign commerce; and, third, registered vessels engaged wholly in foreign trade. Congress saw fit to regulate ves-

sels of the first class only, and has never made any specific provision for vessels of the other two classes. It has left them to state regulation.

"This was the view taken by Judge Lowell in 1880, in Joslyn v. Nickerson (C. C.) 1 Fed. 133, when he said, referring to Act July 25, 1866, c. 234, §9, 14 Stat. 228:

"'This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St. §4401.'

"And the learned judge cited Murray v. Clark, 4 Daly, 468, affirmed in 58 N. Y. 684, a case in which the meaning of sections 4401 and 4444 was discussed at length, and in which it was held that the state might impose a pilotage charge on registered vessels which are also engaged in the coasting trade, and that the rules and regulations established by the United States refer only to coastwise steaming vessels, not sailing under register. In Bigley v. New York P. R. S. S. Co. (D. C.) 105 Fed. 74, Judge Brown said that the effect of sections 4401 and 4444 was—

"'to exempt all steam vessels sailing under a license and employed in the coastwise trade from the pilotage laws of the states, while other vessels remained subject to the state laws.'

"This seems to be the view which was taken in Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115; and the later cases of Huus v. New York, etc., S. S. Co., 182 U. S. 395, 21 Sup. Ct. 827, 45 L. Ed. 1146, and Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224, are not in conflict with it."

The Queen, 186 Fed. 725, at 735.

We now come to the three cases in this Court which have considered Revised Statutes 4401 and 4444, the

codification of the act referred to in the certified questions. Those cases are:

Spraigue v. Thompson, 118 U. S. 90;
Huus v. New York & Porto Rico S. S. Co., 182 U. S. 392;
Olsen v. Smith, 195 U. S. 332.

In no one of these cases was the question of the pilotage of a registered coastwise steamer before the Court. In the first two the vessel was a licensed and enrolled coaster, and in the third a British ship.

Now it is apparent that the resident pilots are excluded from charge of coasters *not* sailing under register under both R. S. 4401 and 4444, even treating them as separate enactments; and also that the pilotage of a British ship was not affected by either section. There was no occasion therefore for these opinions to refer to the original section of the Act of 1871 or to consider the history of the pilotage laws to that date, or the then existing commercial conditions.

However, when we examine the text of the first two of these cases we find that the distinction we make is clearly recognized by this Court.

In the case of *Spraigue v. Thompson*, the Supreme Court lays down the criterion of exemption from State bar pilotage to be "was she piloted as provided by that "title of the statute?" It finds that she was so piloted because she was a coastwise sea-going steam vessel *and* (note the separate affirmation) "was not sailing under register". The language is as follows:

> "According to the agreed case the Saxon was a coastwise seagoing steam vessel, was *not sailing*

under register, and at the time when the defendant in error tendered his services, and subsequently, when she passed up the river into Savannah, was under the control and direction of a pilot licensed by the United States inspectors of steamboats. She was therefore at the time *piloted as provided by that title of the statute, so that she was lawfully exemp from any pilot charges levied by any state or municipal government.*" (Italics ours.)

Spraigue v. Thompson, 118 U. S. 90, at 96.

If the Court had construed the act as our opponents would have it, there could be no need to find as a separate and distinct finding that she "was not sailing under register". All that would have been necessary would be to find that she was a coastwise vessel and had a federal pilot. But the Court intends clearly that the coastwise vessel may take a federal pilot and "be piloted as provided by the act" *only* if she be "not sailing under register". The general remarks of the Court concerning the exemption of coastwise vessels manifestly must refer to this class of coastwise vessels it has before defined.

In the next case, *Huus v. N. Y. & Porto Rico Steamship Company*, the Court makes the same careful distinction between the licensed vessels in the coastwise trade and those sailing under register. It holds that four facts are necessary to exempt a steam vessel from State pilotage: (a) that she was an American built steamship; (b) that she was enrolled and licensed for the coasting trade (and hence not sailing under register); (c) that she had a federal pilot and (d) that she was a coastwise sea-going vessel under R. S., Section 4401. The exact language of the Court is as follows:

> "As the statement of facts connected with the question certified shows that the 'Ponce' was an American built steamship, sailing from New York, belonging to a New York corporation, *enrolled and licensed for the coasting trade*, navigated by a master duly licensed to act as pilot in the bay and harbor of New York under the laws of the United States, and was engaged in trade between the island of Porto Rico and the port of New York, *the only question remaining to be considered* is whether she was a coastwise seagoing steam vessel *under Revised Statute 4401* and actually employed in the coasting trade by way of Sandy Hook under paragraph 2119 of the New York Consolidation Act." (Italics ours.)
>
> *Huus v. New York &c. S. S. Co.*, 182 U. S. 392, at 395.

Two of the criteria are, has she a license, and hence is "not sailing under register"? And is she a coastwise vessel under Section 4401? Not Section 4444, but 4401, which gives a federal pilot for bar work only if the vessel is "not sailing under register".

The subsequent general remarks concerning the exemption of coastwise vessels must mean the coastwise vessels included in Section 4401. No doubt the

> "*general object* of these provisions seems to be to license federal pilots upon steam vessels engaged in the coastwise or interior commerce",

but while it may be generally true, it is clearly not so of the excepted class of *steam vessels under register.*

This brings us to the case of *Olsen v. Smith*, 195 U. S. In that case the pilotage involved was that of a *British vessel*, so that the question of a right to im-

pose a fee on an American coastwise steamer "sailing under register" could not have been *directly* adjudicated.

Two questions were there brought before the Court which led to the discussion of R. S. 4444, though not as the last clause of Sec. 51 of the Act of 1871. The first was, Was the Texas pilotage law invalid *in toto* because it might be read to apply to all vessels coastwise and others? The Court answered that it was not invalid as to all its provisions because the federal law cancelled only those portions with which it was inconsistent. In the course of its discussion the Court says that Section 4444 removes coastwise vessels from the State laws, but it is in no way concerned with how completely it removes them, whether all of them or only those mentioned in Section 4401. The decision is no more than saying this: Admittedly Section 4444 does conflict with the State laws to a certain extent but that does not affect that portion of the State law with which it does not conflict.

The fact that the Court does not consider Section 4401 or Section 51 of the Act of 1871 shows that it was not making any attempt to show *how far* the federal law went in invading the realm of the State.

The second question in *Olsen v. Smith* was, Is the pilotage fee a violation of a treaty containing a clause against discrimination in favor of American vessels, because certain American vessels did not have to pay pilotage? Here again the question was not "are *all* coastwise vessels exempted", but "are *any*". If *any* the treaty, it

was claimed, is violated. The Court again says that R. S. 4444 exempts coastwise vessels, but that it is a right the United States has not given up by the treaty. Not a right because *all* coastwise vessels are withdrawn but a right covering all if Congress desires. The decision is no more than saying, Admitted that coastwise vessels, any of them or all, are free from State fees, the treaty is not violated by imposing such fees on a British ship.

Surely this is not an adjudication that, construing 4444 and 4401 together, in the light of Section 51 of the original act, Congress intended to take the registered coaster arriving from San Francisco, away from the Delaware pilot, in sailing from the Capes to Philadelphia.

The same distinction between the "enrolled and licensed" and the "registered" coastwise steamer is recognized by Judge Brown in *Bigley v. New York etc. Ry. Company.*

Judge Brown expressly points out that these statutes (4444 and 4401) create two great classes of steamers, coastwise sailing under a license (and hence "not sailing under register"), *and all other vessels.* As to all the others they remain "subject to State laws".

> "The effect of the above acts of Congress, is to exempt all steam vessels sailing *under a license* and employed in the coastwise trade from the pilotage laws of the states; while *other vessels remain subject to the state laws.*
>
> "As each of these vessels is a domestic vessel and was navigated *under a coasting license* of the United States no pilotage can be claimed under the

provisions of section 2119 of the New York statute above quoted, if the vessel was in fact 'employed in the coasting trade'; nor second, unless she was 'from a foreign port'." (Italics ours.)

Bigley v. New York &c. Co., 105 Fed. 74 at 75 and 76.

We therefore submit that the plain intent of the statute, the logic of the situation viewed both from the standpoint of the history of the pilotage laws and of the necessities of navigation in 1871, and the decisions are all in accord. The State pilots have control of *all* registered vessels sailing coastwise and the question must be answered in the negative.

IV.

The Second Question Must be Answered in the Negative.

The second question reads as follows:

Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise sea-going steam vessels sailing under register, whose officers have federal pilots' licenses, from any liability for pilotage fees created by Sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, *under the rule of construction laid down in the last sentence of Section 51* of the Act of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam", and as re-enacted in Section 4444 of the Revised Statutes? (Italics ours.)

It is apparent that this question is subordinated to its predecessor and that a negative answer to the first requires the same to the second.

The question is important however in bringing out clearly the fact that Revised Statute 4444 is not to be considered as a separate enactment but merely as a part of the one paragraph making up Section 51 of the

Act of 1871. We again reproduce the two enactments in parallel columns, as follows:

"An Act to Provide for the Better SECURITY OF LIFE on Board of Vessels Propelled in Whole or in Part by Steam.

SECTION 51. And be it further enacted that * * * every *coastwise sea-going steam-vessel* subject to the navigation laws of the United States, and the rules and regulations aforesaid NOT SAILING UNDER REGISTER, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats * * Nor shall any pilot charges be levied by any such authority upon *any steamer piloted as herein provided.* * * * Provided, however, that nothing in *this act shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State." (Italics ours.)

R. S. 4401.

"* * * and every *coastwise sea-going steam vessel* subject to the navigation laws of the United States and to the rules and regulations aforesaid, NOT SAILING UNDER REGISTER, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

R. S. 4444.

"* * * nor shall any pilot charges be levied by any such authority upon *any steamer piloted as provided by this title.* * * * Nothing in *this title shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot not duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State." (Italics ours.)

The rule of construction referred to in the question is as set forth in the last clause in each column:—

"Nothing in this act (title) shall be construed to annul any regulation of * * * any state requiring vessels entering or leaving any port, other than coastwise steam vessels" to take a State pilot.

As we have suggested this last clause of the section must be construed with the first and cannot be held to enlarge the exception of "coastwise steamers not sailing under register" to *all* coastwise steamers. The "particular phrase in the beginning of the paragraph "controls the general phrase at the end" which is but an Anglo Saxon expression of the rule of *ejusdem generis.*

The clause does not of itself withdraw any vessels from State pilotage. It merely points out that the previous enactment does not go *beyond* the class of coastwise vessels. *How much* of that class is affected one must look to the previous affirmative portions of the act to determine.

The Error in the Opinions Below.

It was this treatment of Revised Statute 4444 codifying this last clause of Section 51 as a separate enactment (we submit with deference) that caused the error of the judges below.

We did not appear in the case in the District Court but we have examined the briefs there and can find no reference to the Act of 1871 or even to R. S. Section

4401 which contains the first part of Section 51 of the original act. Certainly an opinion which considers neither and is based on briefs which mention neither, can have but little weight before this Court, even from the excellent judge of the Northern District of California. It should be said for the able proctor for libelants below, that he was laboring under a severe illness at the time of the preparing of the briefs.

Judge Ross' opinion also treats the enactments as separate and relies on Section 4444 as of itself creating an exception to State pilotage. The second certified question in which R. S. 4444 is described as laying down a mere rule of construction seems to indicate that his *confrere*, at least, have withdrawn from that position.

Judge Ross also relied largely on the assumption that R. S. Sections 4442 and 4438 create a system of federal pilots "proper" for coastwise steamers coming in from these *long registered voyages*.

In our petition for rehearing we printed these sections and the corresponding portions of the Act of 1852 in parallel columns and then suggested that this Court had held that the provisions of these sections did not constitute a "proper" pilotage system at all, but only a part of a system and a part of lesser importance at that. We have no doubt the conflict between his dictum on this point and Judge Field's contrary decision in *Joliffe v. Pacific Mail S. S. Co.* (see Section 1, supra) had a part in causing the certification of the questions before this Court. We must assume the blame for not having driven the point home till our petition for rehearing.

Judge Wolverton also treated Section 4444 as a separate enactment. His opinion says that if Congress had not intended in Section 4444 to take coastwise vessels "sailing under register" away from the control of the State pilots "it is more than probable that Congress would have reiterated the words", "not sailing under register".

It is apparent that the learned judge who wrote the second opinion is by his own logic driven to our interpretation of the act. *Congress did not have to reiterate the words of Section 4401 in Section 4444 because they were both part of one section of the Act of 1871.*

Judge Wolverton's concurring opinion seems to lay much stress on the assumption that no one had regarded the State law as applying to registered vessels in the coastwise trade up to 1905. It says:

> "Sections 4401 and 4444 of the Revised Statutes were enacted into law in 1871, and it does not seem to have occurred to any one in the port of San Francisco to contest the right of the United States authorities to regulate the pilotage as it respects steam vessels plying in the coastwise trade until a recent statute was enacted by the State of California in 1905. In all the time preceding that, we must assume that the pilots upon such vessels were such as were licensed by United States authority and not by State authority. And where a statute has continued so long under one construction, it is persuasive of its rightful interpretation."
>
> *The Queen*, 186 Fed. 725, at 735;
>
> *Concurring opinion*, last paragraph.

This assumption had no basis on the record and is contrary to the fact. The "recent statute" is but an

amendment of a statute of over thirty years' standing. The amendment cuts the full pilotage fee in half but eliminates half pilotage (Political Code, Secs. 2466 and 2468). All the vessels of the Pacific Coast Steamship Company, including the Queen and Umatilla, *had paid part pilotage under the California law for many decades and up to the voyages here at bar.* All the registered vessels in the coastwise trade with Atlantic ports, either around South America or via Panama, have either taken a State pilot or paid the State's part pilotage. Whatever sanction the State laws can be said to have from long acquiescence, these laws possess.

It is submitted that the position taken in these opinions below is shown to be erroneous and that, as to the two of them in the Circuit Court of Appeals, the authors have withdrawn from it (temporarily at least) in consenting to the certification here. Section 4444 presents but a rule of construction which when applied to Section 4401, leaves the State pilots in control of coastwise vessels "sailing under register".

V.

Considering Section 4444 Alone, and as Far as the Federal Pilot's Knowledge of Inland Waters is Concerned, a Vessel on a Voyage to a Foreign Port is Not a Coastwise Vessel, Even Though it Include a Coastwise Voyage.

The third question reads as follows:

> "3. Did Congress intend to classify with the 'coastwise vessels' referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled 'An Act for the better security of life on vessels propelled in whole or in part by steam', and re-enacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with *both* foreign and domestic ports on the same voyage? (Italics ours.)

We have heretofore shown that R. S. 4444 should be construed with R. S. 4401, and in the light of Sec. 51 of the Act of 1871. We now consider it as an enactment by itself passed in 1871 "to provide for the better security of life" on steam vessels.

It is perfectly apparent that it is the *length* of the voyage which determines the knowledge of the officer on board a ship, concerning the changing conditions in the various American ports at which he may enter. It makes no difference what kind of cargo he has on board or whether he has none at all. When he has been on a voyage to a foreign port, he will be still less familiar with conditions in the home ports if he has added to the time of the foreign voyage, the time necessary to stop and take on cargo at other domestic ports.

It is our contention that if we construe Section 4444 with reference to "security of life" we must hold that life is less secure where the ship's officer attempts to pilot her in from a coastwise voyage plus a foreign one (even though not a pound of freight is loaded at the latter) than one that is purely coastwise or purely foreign.

When the act was passed the San Francisco-Vancouver trade did not exist, but even applying this rule of interpretation to that exceptional condition, we come to the same conclusion.

All steamers carrying directly between Vancouver and San Francisco alone must be registered and are hence subject to the state pilots. *A fortiori* should such registered vessels be subject to them when in addition to the trip to Vancouver they stop in Puget Sound ports *for a very large part of their cargo*, and thus are by so much the longer kept away from the San Francisco bar and entrance. Let us now take the real example, the case Congress must have had in mind:

Suppose a voyage from San Francisco to Philadelphia around South America, on which a steamship must be registered, as she must stop at foreign ports for coal. Suppose all her *cargo* is coastwise save a small parcel of a hundred tons taken on en route at Valparaiso. Then suppose the *same* voyage in which half the cargo is coastwise and half foreign; and the *same* voyage when a hundred tons is coastwise and three thousand tons foreign, having come from British Columbia.

Would it make the slightest difference as far as security of life while the ship's officer is piloting up Delaware Bay and on the Schuylkill, which one of the above cargoes he had on board? Manifestly not, and equally manifest that it is the character of the *voyage* and not the *cargo* that determines the meaning of the phrase "*coastwise vessels*" in R. S. 4444.

It was this that Judge Gilbert had in mind when he says in his opinion:

> "The field of legislation which Congress might have covered by pilotage regulations comprised three classes of vessels: First, licensed and enrolled vessels engaged in the coasting trade; second, registered vessels engaged partly in coasting trade and partly in foreign commerce; and third, registered vessels engaged wholly in foreign trade. Congress saw fit to regulate vessels of the first class only, and has never made any specific provision for vessels of the other two classes. It has left them to state legislation."

In our briefs in the Circuit Court of Appeals we criticised Judge De Haven's opinion because he based it chiefly on the fact that the preponderance of the cargo was coastwise and hence held the vessel was a coastwise vessel for purposes of pilotage. We tried to point out, just as we have here, that the kind of *cargo* had nothing to do with the question of pilotage in so far as the safety of the lives of the sailors and passengers on board is concerned. Judge Ross answered our contention in his opinion as follows:

> "On behalf of the appellants it is suggested that the alleged error on the part of that court arose because it failed to remember that the existing

> statutes of the United States upon the subject were enacted for the 'better protection of the lives of passengers'. The learned judge of the court below could hardly have been unmindful of the fact that the primary purpose of all pilotage laws is the safety of persons on board the vessels to be piloted."

With all deference we still urge that the *ratio decidendi* of the opinions of *both* these learned judges shows them "unmindful of the fact that the primary purpose " of all pilotage laws is the safety of persons on board " the vessels to be piloted".

Applying their rule of determining the nature of the vessel as coastwise or not, by the preponderance of cargo, let us stand alongside a steamer's captain coming into the Hell Gate at New York from a voyage from New Orleans via Havana. Surely Congress was not "unmindful" of the Hell Gate *as it was in 1871* or of the large trade then existing from the Gulf and Havana to New York.

Let us suppose that sixty per cent of the cargo in weight is from New Orleans, while sixty per cent in *value* on the manifest is from Havana, and eighty per cent of the passengers are from Havana, but the passengers from New Orleans (mostly first class) pay more money than the Havana passengers.

Now, let us suppose the captain knew all about the rule of the learned Judges and wanted to apply it, and all of us are with him on the bridge trying to help him out. The resident pilot is alongside and awaits our signal. "Can I take this vessel in past Hell Gate"? says the captain. "Where's your purser"? says our op-

ponent. "Let us look at his balance sheet." "He's sick", says the captain; "got the fever at Havana. Here's the manifest, though". "Why this is cotton from "New Orleans and tobacco from Havana, and cotton "had jumped by the time we reached Havana so it "was worth more than the tobacco. This vessel is now "sailing coastwise. You take her in, captain." "But "how am I to know that cotton is now what it was at "Havana. Besides there are these passengers. Eighty "per cent come from the foreign port." "Oh, but cap- "tain", says our opponent, "you must look at the pass- "age moneys, and more money comes from the passen- "gers from New Orleans. Your vessel is certainly "coastwise." "Are you not rather *unmindful* of the "security of human life"?, says the captain. "Oh, no", says our opponent, "we are not. It was Congress "that was unmindful." "Thank you", says the captain. "I'll take her in, but I *do* hope there is no mis- "take in the figures. What would I have done if the "purser had been taken ill earlier on the voyage"?

Now this, we submit, is neither an extreme nor an unfair application of the rule laid down by these two Judges. Could Congress have meant this, when it passed R. S. 4444? We submit not. Congress must have intended some simpler, more *practicable* test for the guidance of the captain of the vessel from San Francisco when at the Hell Gate or the Capes of the Delaware or the mouths of the Mississippi, than the balance sheet of freight and passage moneys or the relative tonnage of cargo or number of passengers.

What that test is is perfectly plain. Has she been to a *foreign* port, thus requiring her to take a *register?* Has her *voyage* been a *foreign* voyage—whether foreign alone or both coastwise and to a foreign port? If so, the vessel is not "coastwise" within the meaning of Section 4444 exempting coastwise vessels from the control of these resident state pilots.

It will be noticed that if we interpret R. S. 4444 in this common sense way we do not conflict with the alleged adverse dicta in *Olson v. Smith,* even if we consider them out of their context. There is nothing in any of the opinions, other than those of Judges Ross and De Haven, which even suggests that a vessel is coastwise for purposes of pilotage if her balance sheet is coastwise and vice versa.

In our next section we will suggest how these two Judges fell into error. We feel confident that we have shown to a certainty that there is no reason why voyages which are both to foreign and domestic ports are to be treated as coastwise, and that the only vessels exempted by Congress from the control of the resident pilots are those on *voyages* purely coastwise and nothing else. The third certified question must be answered in the negative.

VI.

The Fourth Question Certifying the Whole Case Must be Answered in the Light of the First Three and in the Negative.

The voyages in question in this suit were from San Francisco direct to Vancouver, then to Puget Sound ports, then to Vancouver, then direct to San Francisco. The bulk of the passengers and the freight were carried between the Puget Sound ports and San Francisco. The stop at Vancouver was for but an hour and may be deemed "en route".

As we have pointed out, this trade was not in existence in 1871, when Section 51 of the pilotage act was passed, or in 1873, when it was codified in R. S. 4401 and 4444. But the trade between Atlantic and Pacific ports around South America then was. In every respect, save as to length, it presents the same features. It began at a port of the United States and ended there. The great bulk of the cargoes were of domestic goods, the stops at Valparaiso and Sand Point were purely incidental, for a short time, and en route. A register was necessary and a simple feature easily distinguishing such vessels from others going coastwise, and "not sailing under register".

So, also, of the trade from the Gulf to north Atlantic ports. The bulk of the cargoes were cotton. The stops at Havana were incidental, for a comparative shorter time and smaller amount of merchandise. Also they were "en route".

Now, it is entirely conceivable that Congress, if legislating today and solely for the Vancouver-Sound trade, would not except coastwise vessels "sailing under register" from the control of the resident bar pilots at San Francisco. But it is not conceivable that an act in 1871 covering all these dangerous ports of both the Atlantic and the Pacific, intended to give to a captain the right to pilot his vessel in, when he had been absent for weeks and often months.

This is where Judges De Haven and Ross committed what we believe to be their error. They regarded the act as passed for the Vancouver-Sound trade alone and failed to appreciate how far-reaching their decision was. They saw only the California law as applied to this trade, and failed to realize that they were deciding for the ports of Louisiana, Pennsylvania, New York and Massachusetts as well.

We submit that the Act of 1871 must be interpreted with a view to the "better security of life" at all these ports and with a view to the *great* preponderance of voyages between American ports in vessels sailing under register, and not to an exceptional and smaller commerce which has since arisen.

If, however, Congress is to be credited with such prescience, it must have had in view the coastwise trade between Atlantic and Pacific ports destined to be carried through the Panama Canal. Even in fast freighters the ship's officers will be absent on round voyages to California and the Pacific coast from New York or Philadelphia or Boston over 40 days from these waters. In

most cases they will be away twice as long. They may at any time be compelled to call at Central American or West Indian ports for coal or supplies. Many will trade *en route* at these foreign ports. *All will be sailing under register.* Did Congress which has itself supplied no local pilotage intend to except these vessels from the control of the state pilot resident at these ports? The answer cannot be other than, No.

We therefore submit that the fourth question certifying the whole case, if it be answered at all, must be answered in the negative.

WILLIAM DENMAN,
Proctor for Appellants.

Due service and receipt of a copy of the within is hereby admitted

this Seventh *day of February, 1912.*

(Signed) Geo. W. Towle

Proctor for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 641.

M. ANDERSON, APPELLANT,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, APPELLEE.

No. 642.

N. JORDAN, APPELLANT,

vs.

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, APPELLEE.

REPLY BRIEF FOR APPELLANTS—SAN FRANCISCO BAR PILOTS—COVERING BOTH APPEALS.

I.

The Formal Construction of Section 51 of the Act of March 28, 1871.

The pertinent portion of section 51 of the act of 1871, as it appears in the certificate, reads as follows:

> "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam.
>
> "SECTION 51. *And be it further enacted,* That * * * every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register, shall,* when under way, except on the high seas, be under the *control* and *direction* of pilots licensed by the inspectors of steamboats. * * * Nor shall *any pilot charges* be levied by any such (State) authority upon any steamer piloted as herein provided: * * * *Provided, however,* That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."
>
> (The above in a single paragraph.)

Our construction of this act is that the first clause limits the jurisdiction of the Federal pilots

to those coastwise vessels not sailing under register; the second clause prohibits the levying of State charges on any such coastwise vessel if the vessel is piloted by a Federal pilot as provided therein (the State might attempt to levy a charge against the licensed coaster for maintaining the pilotage service even though she did have a Federal pilot on board); and that the third, the proviso clause at the end relating to coastwise vessels, under the familiar rule of statutory construction, is not to be deemed to expand the scope of the enacting clause at the first of the act providing for coastwise vessels not sailing under register.

Our opponent's first criticism of this construction is that it makes the clause prohibiting the levying of tolls on vessels piloted under the provisions of the act (*i. e.*, coasters not registered) entirely superfluous. We are unable to follow his reasoning. Congress may very well have feared that the States would levy a toll on the licensed coaster even though they could not always put their pilots on board. They might well say "We have our service at hand for the licensed coasters. If the Federal pilot on board has lost track of bar and entrance and channel conditions, our pilots are there at his command. We are entitled to pay for maintaining the service for the occasion when they *do* want it, even though we cannot compel them to accept it, when they do not."

The situation is not unlike that of a steamer which mere "stands by" ready to render salvage

assistance to another which is in a dangerous position. The vessel standing by is entitled to a salvage lien on the vessel finally saved, even though she does not actually put a line on board of the other, and could not *compel* the other to accept her assistance.

> Kennedy on Salvage, ch. 5, p. 125 (Ed. 1891).

Now, it entirely explains the clause prohibiting the levy of charges on vessels piloted as "provided herein" that Congress wanted to make certain that the State would not attempt to collect such pilotage fees from licensed coasters. To say coasters, not under register, shall be taken by Federal pilots, is entirely different from saying "nor shall such vessels pay any fees if Federal pilots are on board." Thus interpreted the provisions are correlative and supplementary. The second is not redundant.

Our opponent's next criticism is that the proviso at the end of the act of 1871 is meaningless, unless we treat it as a *grant of power* to the State to levy pilotage charges on all but coastwise steamers.

But the State does not receive its power to enact pilotage laws from a grant by Congress. This very question was considered by this court in Gibbons *vs.* Ogden, when court said:

> "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the Government of the Union was brought

> into existence it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned (act of Aug. 7, 1789) *adopts* this system and gives it the same validity as if its provisions had been specially made by Congress."
>
> Gibbons *vs.* Ogden, 9 Wheat., 207.

Congress clearly recognizes in the proviso of section 51 this distinction of Gibbons *vs.* Ogden, for it provides "that nothing in this act shall be *construed* to *annul or affect* any regulation," etc. The proviso merely states a rule of construction of other provisions. There is nothing in it purporting to delegate power. Nor is there anything in the proviso which, *of itself*, limits any power previously conferred. The proviso that nothing shall be construed to affect State regulations save as to *furnishing pilots* for coastwise vessels, leaves us free to *construe* the *other* Federal pilotage laws as to coastwise vessels. When we turn to construe those Federal laws we find that none can be construed as giving any coastwise vessels to Federal pilots, save those "not sailing under register."

The general terms of the proviso, in the nature of a summary, are subject to the rule of "*ejusdem generis*," the specific mention of coasters not registered, controlling over the general phrase "coastwise vessels."

As we have before suggested the rule of *ejusdem generis* is but another form of the axiom "particular phrases control general."

We submit that the construction of the act we urge does not occasion any redundancy, but on the contrary is one with itself. It makes its provisions entirely rational, and, we believe, far more consistent with the purpose expressed in its title than that of our opponent.

II.

Congress did not intend in the act of 1871 to establish Federal bar pilotage establishments. It was satisfied that its pilots, always on board, could bring in short-voyaged licensed coasters, but not the longer-voyaged registered vessels.

The appellees seek to show that Congress intended to make three classifications, namely, registered vessels whose trade is almost entirely foreign, to be given to the State resident bar pilots; registered vessels mostly in the coastwise trade (making incidental foreign stops as at Valparaiso on a round voyage from New York to San Francisco), who *may* use their Federal pilots to the exclusion of the State pilots; and licensed coasters who *must* use Federal pilots.

They say that Congress must have as much confidence in its pilots for the short licensed coastwise voyage as it has for the relatively longer registered voyage of coastwise vessels.

Now, the significant thing here is that our opponents concede that Congress was moved by the underlying maritime fact that for purposes of

general classification the registered coaster *is* engaged in the longer voyages.

We are unable, however, to agree with the deductions which our opponents draw from this fact. They say that Congress made it optional with the registered coaster whether she should take a Federal or other pilot, because *in foreign waters* Congress might not control the pilotage of the vessel. But this presumes that the act contemplates control of pilotage outside the United States, whereas the provisions of the section (51 of act 1871) are in its first lines limited to vessels navigating "within the jurisdiction" of the United States. Congress in legislating for navigation within this jurisdiction *solely*, could not have been moved by considerations as to what might occur in foreign waters.

Their next argument is equally untenable. It is that the Federal pilot licensed for the Atlantic coast might not have a license for the Pacific coast, and, therefore, there should be an option given to the vessel as to whether she shall take a Federal or State pilot. It is apparent that on such a voyage there is no option given on the Pacific coast, so that the power of choice is confined to the Atlantic coast; *that is, when the vessel returns from her long voyage after the Federal pilot has been absent weeks, and quite likely months, from the Atlantic inland waters, over which the vessel is to navigate.*

The analysis of the contention brings this clear

reductio ad absurdum and need be pursued no further. Here we find the answer to our opponent's question as to why, if Congress was satisfied with its Federal pilots for licensed coasters, it was not satisfied with them for coastwise vessels sailing under register? *It was because Congress did not contemplate that the Federal pilots should be residential bar pilots, but intended that they should stay by the ship all through her voyage.* This is apparent from the following section of the Revised Statutes, compelling the Federal pilot to *stand watch* with the other officers of the ship:

> "R. S. 4131. All the officers of vessels of the United States who shall have *charge of a watch, including pilots,* shall in all cases be citizens of the United States."

And from the following, in the act of 1871, requiring the pilot to have his certificate framed and hung up on the vessels on which he is sailing:

> "SEC. 18. * * * And every such * * * pilot who shall receive a license as aforesaid, shall, when employed upon any such vessel, place his certificate of license (which shall be framed under glass) in some conspicuous place in such vessel, where it can be seen by passengers and others *at all times.*"

It is apparent that Congress did not intend that the supervising inspectors should establish any system of residential bar pilots, but contemplated

that the Federal pilot should be one of the ship's officers; should stay by the ship, and on long voyages, would necessarily be long absent from the waters of the home ports. It is absurd to suppose that a *residential* Federal pilot should climb up the rope ladder off his pilot boat and on to the steamer signaling to him, often in a raging sea, with his certificate, *framed under glass*, in his hand, ready to be hung where the passengers could at *all times* see it.

It is equally absurd to suppose that if the Federal pilot was to be a residential pilot, only taken on the steamer as she entered port, that he should be specially required to *stand watch* with the other officers. As a matter of fact he is supposedly on active duty on the bridge at all times till his vessel is moored or on the high seas, at which times he leaves her.

Even if the acts of 1871 and the later amendments did not, on their face, clearly indicate that Congress had no intention of creating a Federal residential pilotage, the fact that no new provisions for the examination and licensing of pilots have been enacted since the act of 1852, would compel this court to hold that Congress did not intend to create such a system. For it has so held as to that act in the case of Joliffe *vs.* P. M. S. S. Co., which we have more fully considered at page 9 of our opening brief.

Our answer to our opponent's question is, Yes, Congress was not satisfied that its Federal pilots,

officers of registered coastwise vessels on these longer voyages, should bring their vessels into the ports of Philadelphia, or New York, or Mobile, or New Orleans, while it was satisfied to permit them to do so on the shorter-licensed voyages which kept them from these waters for a much shorter period.

III.

The act of 1867 expressly recognizing all State pilotage regulations, fortifies our contention that the act of 1871 merely excepts from them those coastwise vessels not sailing under register.

The act of 1867 amends the act of 1866, leaving the law as follows:

> "And *every* seagoing steam vessel now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, *except upon the high seas*, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted: *Provided, however*, That nothing in this act, or in the act of which it is amendatory, shall be construed to annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of the same port."
>
> 14 U. S. Statutes at Large, 412.

The act of 1871 by specific mention took away from the Federal pilots the control on inland waters of "*every*" sea-going steam vessel, and limited their control to such vessels "not sailing under register."

Could anything show more significantly the intent that their control should not extend beyond the class thus cut out from the whole body of shipping? We confess that we are unable to follow our opponent's attempted reasoning to a contrary conclusion.

So also are we unable to follow counsel's contention that the proviso of the act of 1867 is a *limited grant of power* to the States, validating their existing systems. The term "existing" must, we believe, have reference to the system existing at the time of "entering or leaving the port in such State," not at the time of the passage of the proviso. If not, we would have the absurd situation of the State losing its control of certain vessels if it should amend its laws and *reduce* the pilotage charges.

However, whether we interpret the word "existing" one way or another, Congress was recognizing full State control of pilotage when in 1871 it passed the law giving the control to Federal pilots only to coasters "not sailing under register." The inference that it intended that the State should have the balance of the coastwise vessels seems too obvious to require argument. When we examine the length of the voyages of these remaining regis-

tered coasters with reference to pilotage, and the security of human life, the conclusion is irresistible that Congress meant that the residential State pilot should take them in.

IV.

The executive construction of the act of 1871 has been, that it was not intended to create a system of Federal pilots residential at these more dangerous ports and cruising upon their waters.

It is now over forty years since the act of 1871 was passed. There is not a *Federal pilot boat* in the United States. There is no Federal organization for furnishing a pilot living at any of these ports of more difficult access to entering steamers.

This is most significant. Surely with all the pressure the great shipping companies would bring to bear—we know, from the Chief Justice himself, that the struggle between the State pilots and the companies has been long and bitter—the Treasury Department, or its successor in these matters, the Department of Commerce and Labor, long ago would have established residential bar pilotage systems if it could have been done under the law.

That such executive construction shall receive consideration by this court is now long established.

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful con-

> sideration, and ought not to be overruled without cogent reasons. Edwards *vs.* Darby, 12 Wheat., 210; U. S. *vs.* Bk., 6 Pet., 29; U. S. *vs.* MacDaniel, 7 Pet., 1. *The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.*"
>
> *U. S. vs. Moore*, 95 U. S., 760, 763.

In another case, in considering a ruling of the Treasury Department, the court says:

> "But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government,—the action during many years of the Department charged with the execution of the statute should be respected and not overruled except for cogent reasons. Edwards *vs.* Darby, 12 Wheat., 206, 210; United States *vs.* Philbrick, 120 U. S., 52, 59; United States *vs.* Johnson, 124 U. S., 236, 253; United States *vs.* Alabama G. S. R. Co., 142 U. S., 615, 621."
>
> *U. S. vs. Finnell*, 185 U. S., 236, 244.

The bill for the act of 1871 was drafted by the Treasury Department.

> Congressional Globe, Feb. 16, 1871, part 2, page 1321.

We endeavored in our argument to point out the essential difference between residential pilotage and the pilot who is but one of the ship's officers.

Joliffe *vs.* The Pacific Mail Steamship Company explains the distinction very clearly. It needs but a moment's consideration to determine that, at *some* of the ports of the United States, such residential pilotage systems are absolutely necessary for the pilotage of vessels which have been long from their waters.

These harbors have large watersheds behind them—Delaware Bay with three rivers, Chesapeake Bay with two, New York harbor with the Hudson, the lower Mississippi with its several mouths, San Francisco Bay with the Sacramento and the San Joaquin rivers, the Columbia River entrance with its dangerous and varying bar. In all these are three incessant variables; first, the change in *channel* due to rearrangement of the deposit of silt on their bars and shallows; second, the change in *velocity* of current due to combination of tide and the variable quantity of river water, varying both with rainfall and with freeze and thaw; and third, the change in *cross-currents* and eddies due to variable combination of river water and tide and shifting of bars.

As these changes are from time to time noted by the State pilots, cruising in their pilot boats on the bars, and by other observers, they are posted at the various United States hydrographic offices. A glance at the bulletin board of any of these offices would quickly dispel any illusion that a vessel of any considerable size can be safely taken into some of our harbors by a man whose information as to conditions there is several weeks old.

And while this is true today, it was more certainly so in 1871, when the very extensive work since done on our rivers and harbors had been scarcely commenced.

The loss of the "Rio de Janeiro" is but a dramatic and conspicuous example of the not infrequent wrecking of vessels from change of currents due to changes of volume of fresh water from the watershed draining into the harbor and out of its entrance. In that case the State bar pilot knew his danger, protested against bringing in the vessel, but was overborne by the captain in command who was just returning with his vessel from the Orient.

We submit that the absence of any action by the Treasury Department towards creating a residential bar-pilotage service, with its cruising pilot boats, its fixed stations, and its code of signals as to changes in conditions, is most significant. Even if the rule of law that this court must regard this executive construction of the act were not clearly established, we would feel that, as a matter of novel impression, the court would adopt it in this case.

V.

The alleged inconsistency in our answer to the third certified question is due to a mere argumentative assumption.

Our opponents complain that in our construction of section 4444 as a separate statute instead of as a proviso to section 51 of the act of 1871, we are inconsistent with the rest of our brief. They failed to read the significant paragraph at the beginning of section:

> "We have heretofore shown that R. S. 4444 *should* be construed with R. S. 4401, and in the light of sec. 51 of the act of 1871. We now *consider* it as an enactment *by itself* passed in 1871 'to provide for the better security of life' on steam vessels."
>
> Appellants' Opening Brief, p. 41.

Congress in the act of 1871 undoubtedly intended a distinction between the long-voyaged registered vessels in the coastwise trade and the licensed coasters. But both Judges Ross and De Haven missed the point and treated section 4444, which merely codifies the *proviso* of section 51 of the act of 1871, as if it were a separate enactment.

Our argument on the third certified question, appearing from pages 41 to 46 of our brief, was addressed to the erroneous view of these opinions and aims to show that even construing it from their standpoint, a vessel sailing to a foreign

port is not a coastwise vessel, *for purposes of pilotage.*

We, however, now address that portion of our brief to the suggestion of our opponent that the third certified question cannot be answered because dependent on considerations not shown in the question.

What these other considerations are, appeared from his argument. They are, 1, the *relative* length of voyage *along the shores of the United States* as compared to other waters covered by the voyage; and, 2, the *relative* amount of *cargo,* as between domestic and foreign goods. That is to say, the captain, when he arrives at the home port from a round voyage, must add up the number of miles he has traveled in various waters and carefully examine his manifest to balance up the foreign goods against the domestic, and then determine whether his vessel is sailing coastwise or foreign. If the one, he may take her in himself; if the other, he must take a State pilot.

The absurdity of such a criterion we have shown by our illustration at page 44 of our brief. We now suggest another dilemma for the captain. Suppose the greater part of his voyage were along coasts of the United States, as from Seattle to San Francisco via Vancouver, and ninety-five per cent of the cargo was foreign, *i. e.*, from British Columbia? Did Congress intend to establish a rule that would subject the captain to such puzzling uncertainties?

We submit that Congress must have intended some simple and easy criterion, and that criterion was, "Have I a register?"

Our opponents suggest that some registered coasters are engaged exclusively in trade between American ports. In this he is entirely mistaken. *The register is never taken out save for the purposes of entering foreign ports.* Its entire significance, *as far as pilotage is concerned,* is—foreign port—hence longer voyage—hence less familiarity with bar conditions at home port.

It is true that with the acquisition of our insular possessions many foreign voyages are now shorter than those to our own ports, *but this was not the condition in* 1871, *when the act was passed.* It is in the light of our commerce and its routes at *that time* that the act must be interpreted. If the law no longer fits our changed conditions, the law should be changed by Congress and not by retrospective judicial interpretation.

So also it is true that the improvement in the steam engine since 1871 has not only increased the speed, but greatly decreased the coal consumption of our steamers, and as greatly increased their steaming radius. Vessels from the Gulf to North Atlantic ports may no longer find it economically advantageous to stop and coal and incidentally trade and take passengers at West Indian ports. But it is in the light of the condition of commerce as it *then was,* and of the steamboat *of that day,* whether carrying some of its coastwise goods to

New Orleans or to Aspinwall for California, or around South America to California ports, that Congress was legislating.

And, as our opponent concedes, in the light of that commerce the register meant the longer and the license the shorter voyage.

It is therefore submitted that all four of the certified questions should be answered in the negative.

WILLIAM DENMAN,
Proctor for Appellants.

IN THE

Supreme Court of the United States.

No. 641.

M. ANDERSON,
Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION) CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE,
Appellee.

No. 642.

N. JORDAN,
Appellant,

vs.

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE,
Appellee.

BRIEF FOR APPELLEES COVERING BOTH APPEALS.

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IN THE

Supreme Court of the United States.

M. ANDERSON,
Appellant,
vs.
THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship *Queen*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
No. 641

N. JORDAN,
Appellant,
vs.
THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship *Umatilla*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
No. 642

Brief for Appellees.

The four questions certified by the Circuit Court of Appeals raise substantially the broad question whether the steamships *Queen* and *Umatilla* when sailing under register on voyages between San Francisco and United States ports on Puget Sound, stopping *en route* at Victoria, B. C., are liable when entering or leaving San Francisco to

pay the pilotage fees levied by the California statutes of 1905, even though they were in charge at the time of officers holding federal pilots' licenses for the port of San Francisco and were, in fact, piloted by such officers when entering or leaving that port.

The appellants' argument, when analyzed through a study of their brief, consists in substance of two points: First, that Congress has withdrawn from state pilotage regulation only those vessels referred to in R. S. Section 4401, to wit: coastwise steam vessels not sailing under register, which means only steam vessels sailing under license; and second, that even if Congress has withdrawn from state pilotage regulation all coastwise steam vessels, that expression includes only steam vessels engaged exclusively in the coasting trade which do not stop at foreign ports for any purpose.

In order to sustain the first point the appellants recognize that Congress has made a distinction between coastwise steam vessels which sail under register and those which do not sail under register, and that vessels which are sailing from one port to another of the United States and which stop en route or incidentally at foreign ports, and for this reason must sail under register, are, nevertheless, coastwise steam vessels. They contend, however, that Congress intended that coastwise steam vessels of this latter class as well as all other steam vessels sailing under register, should still be subject to pilotage regulation by the states. One obvious difficulty with this argument is that it makes § 4444 wholly superfluous and gives no meaning or effect to any of its provisions.

In order to sustain the second point, appellants attempt to give some meaning and effect to Section 4444, but only by giving to the expression "coastwise steam vessels" a construction which is both

strained and unnatural and directly inconsistent with the contentions previously made in an effort to sustain their first point. They contend in effect that this expression in Section 4444 means only those steam vessels which, whether registered or licensed, are engaged exclusively in coasting trade. They recognize, however, in this connection, that the states cannot regulate the pilotage of coastwise steam vessels which are sailing under register and are in fact engaged exclusively in the coasting trade, which is directly contrary to their contention under the first point that the states can regulate the pilotage of all vessels sailing under register whether engaged exclusively in the coasting trade or exclusively in foreign trade, or in both the coasting and the foreign trade.

It is obvious that the appellants' contentions must fall of their own weight when they are compared with the other contentions made by the appellants, and that neither construction of the statutes suggested by appellants will stand the fundamental rules and tests for statutory construction, because they do not give effect to all the provisions of the statutes and do not recognize that Congress, when using different expressions in different parts of the same statute, must have intended that they should have different meanings rather than the same meaning. When Congress referred in § 4401 to coastwise steam vessels not sailing under register, it must have contemplated that there were or might be coastwise steam vessels which were sailing under register, and when it referred in § 4444 to "coastwise steam vessels" without adding the qualifying words "not sailing under register" it clearly intended to include all coastwise steam vessels, both those sailing under register and those not sailing under register. It is also clear that when Congress provided in Section 4444 that no pilot charges should be levied by any state upon

any steamer piloted as provided in Title 52, it intended those words to have some meaning and effect beyond that already expressed and accomplished in Section 4401, and that it would not have added this prohibitory clause if it were wholly unnecessary. By providing in Section 4401 that coastwise steam vessels not sailing under register should, except on the high seas, be under the control and direction of federal pilots, it clearly intended that such vessels should not be under the control or direction of state pilots when entering or leaving ports, and it would necessarily follow that no state could lawfully require any such vessel to take a state pilot for the purpose of entering or leaving port and *a fortiori* could not levy upon any such vessel any pilotage charges.

We contend that all the provisions of Section 4444 have a definite and well-defined meaning and effect, as will appear from a study of the history of the legislation of Congress upon the subject of pilotage, and that the effect of the present statutes is to withdraw wholly from state pilotage regulation all coastwise steam vessels not sailing under register, to prohibit the states from requiring coastwise steam vessels sailing under register to take a pilot when entering or leaving port or to levy any pilot charges upon any such vessel, if at the time it is piloted by a federal pilot licensed for the port in question, and to leave to the States the power to require vessels, other than coastwise steam vessels, to take a state pilot when entering or leaving port.

We further contend that the steamers *Queen* and *Umatilla* involved in these actions, even though sailing under register and stopping incidentally at a foreign port, are coastwise steam vessels, and were at the times mentioned in the certificate piloted by a federal pilot licensed for the port of San Francisco.

We agree with appellants that in order to ascertain the true meaning and effect of the present statutes it is necessary to examine the history of the legislation of Congress upon the subject of pilotage, but we claim that it is necessary to go back farther and study the history of such legislation more carefully than the appellants have done. We contend that in 1866 Congress placed all seagoing steam vessels subject to the Navigation Laws of the United States, under the exclusive control and direction of federal pilots, except when on the high seas, and withdrew such vessels entirely from state pilotage regulation when entering or leaving ports, and that the effect of the subsequent statutes has been to limit the exclusive control over port pilotage assumed by Congress and to give back to the states certain powers of regulation which had in 1866 been taken away from them; and that for this reason such provisions of the present statutes as give to the states any powers to regulate port pilotage should be construed strictly against the states. When this contention is established, the meaning and effect above suggested for Sections 4401 and 4444 of the Revised Statutes will appear clearly to be correct. It is only by this means, we submit, that an intelligent and reasonable meaning can be given to all the provisions of these sections.

We rely upon the following well-established rules of statutory construction:

Effect must be given to all provisions of a statute if such a construction is consistent with the general purposes of the Act and the provisions are not necessarily conflicting. One provision should not be construed to defeat or destroy another, but rather to explain and support it. If the same words or expressions occur in different parts of a

statute, they must, as a general rule, be taken to mean the same thing.

Market Co. *vs.* Hoffman, 101 U. S., 112, 115;
Bernier *vs.* Bernier, 147 U. S., 242, 246;
United States *vs.* Hill, 123 U. S., 681;
Re Jackson, 40 Fed. Rep., 372.

The office of a proviso generally is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extended to cases not intended by the legislature to be brought within its purview. Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall clearly within its terms. A proviso carves special exceptions out of the enacting clause, and those who set up any such exceptions must establish it as being within the words as well as within the reason thereof.

United States *v.* Dickson, 15 Peters, 141, 165;
Ryan *v.* Carter, 93 U. S., 78, 83;
Minis *v.* U. S., 15 Peters, 423, 445;
Selma R. R. Co. *v.* U. S., 139 U. S., 566;
Georgia R. R. Co. *v.* Smith, 128 U. S., 181.

A proviso is most frequently intended to restrain the enacting clause and to except something which would otherwise have been within it. As a corollary, it is held that the general language in the enacting clause should be so construed that it

would cover the matters contained in the proviso, if the enacting clause had stood alone.

Thaw *v.* Ritchie, 136 U. S., 519, 541;
Wayman *v.* Southard, 10 Wheaton 1, 30.

It is also held that when a new statute is enacted which covers the same subject matter as an old statute, but expressly repeals the old statute, it should be construed as continuing the old statute with such amendments, modifications or changes as may appear in the new statute, and that the new statute should be construed to change or modify the old statute only in so far as such changes or modifications are clearly indicated.

Steamship Co. *v.* Joliffe, 2 Wall., 450;
McDonald *v.* Hovey, 110 U. S., 619, 629;
U. S. *v.* Ryder, 110 U. S., 729, 740.

If the new statute is ambiguous, the Court is authorized to refer to the original statutes, from which the new section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply.

The Conquerer, 166 U. S., 110, page 122;
U. S. *v.* Bowen, 100 U. S., 508;
Meyer *v.* Car Co., 102 U. S., 1, 11;
U. S. *v.* Latcher, 134 U. S., 624.

POINT I.

The States have no power to levy pilot charges upon any coastwise steam vessel or to compel any such vessel to take a pilot, when entering or leaving port, if such vessel is not sailing under register or is in fact piloted by a Federal pilot licensed for the port in question.

It is conceded that Congress has, under the constitution, full and plenary power to regulate port pilotage as well as pilotage during voyages, and that all acts of Congress relating to this subject are valid.

The first act of Congress relating to pilotage was passed August 7, 1789, being Section 4 of Chap. 9 of "An Act for the establishment and support of lighthouses, beacons, buoys and public piers." It provided as follows:

> "All pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress." 1 Stats. at Large, p. 54.

This provision has never been expressly repealed, although it has to a large extent been superseded by subsequent legislation but has remained in the statutes ever since 1789, and appears now as §4235 of the Revised Statutes.

On March 2nd, 1837, Congress enacted as Chap. 22 of "An Act Concerning Pilots"

> "That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters to pilot said vessel to or from said port; any law, usage, or custom to the contrary notwithstanding." 5 Stats. at Large, p. 153.

Certain acts were passed in 1838 and 1843 to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, but they related chiefly to inspection of boilers, life preservers, etc., and not in any way to pilotage.

The first act of Congress making any provision for pilots to be licensed by federal authorities was passed August 30, 1852, being entitled "An Act to provide for the better security of lives of passengers on board of vessels propelled in whole or in part by steam and for other purposes." This act contained among others the following provisions:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no license, register, or enrolment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second sec-

tion of the act to which this is an amendment."

SECTION 9. "*And be it further enacted*, That instead of the existing provisions of law for the inspection of steamers and their equipment, and *instead of the present system of pilotage* of such vessels, and the present mode of employing engineers on board the same, the following regulations shall be observed, to wit:" * * *

SIXTH.—"The said inspectors shall keep a regular record of certificates of inspection of vessels, their boilers, engines, and machinery, whether of approval or disapproval, and when recorded, the original shall be delivered to the collector of the district; they shall keep a like record of certificates, authorizing gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids and materials which ignite by friction, or either of them, to be carried as freight, by any such vessel and when recorded deliver the originals to said collector; they shall keep a like record of all licenses to pilots and engineers, and all revocations thereof, and shall from time to time report to the supervising inspector of their respective districts, in writing, their decisions on all applications for such licenses, or proceedings for the revocation thereof, and all testimony received by them in such proceedings."

SEVENTH. "The inspectors shall license and classify all engineers and *pilots* of steamers carrying passengers."

NINTH. "Whenever any person claiming to be a skilful pilot for any such vessel shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him *for one year* to be a pilot of any such vessels

within the limit prescribed in the certificate; but the license of any such engineer or pilot may be revoked upon proof of negligence, unskilfulness, or inattention to the duties of the station:"

TENTH. "It shall be unlawful for any person to employ, or any person to serve as engineer or *pilot*, on any such vessel, who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for each offence: *Provided, however*, That if a vessel leaves her port with a complement of engineers and pilots, and on her voyage is deprived of their services, or the services of any of them, without the consent, fault, or collusion of the master, owner, or any one interested in the vessel, the deficiency may be temporarily supplied until others, licensed, can be obtained."

SEC. 38. "And be it further enacted, That all engineers and *pilots* of any such vessel shall, before entering upon their duties, make solemn oath before one of the inspectors herein provided for, to be recorded with the certificate, that he will faithfully and honestly, according to his best skill and judgment, perform all the duties required of him by this act, without concealment or reservation; and if any such engineer, pilot, or any witness summoned under this Act as a witness, shall, when under examination on oath, knowingly and intentionally falsify the truth, such person shall be deemed guilty of perjury, and if convicted be punished accordingly."

SEC. 44. "And be it further enacted, That all parts of laws heretofore made, which are suspended by or are inconsistent with this act, are hereby repealed."

The question arose whether this act superseded or nullified any state pilotage regulations, and it was held by the Supreme Court in 1864 that it did not apply to port pilots or supersede or affect

any state regulations respecting port pilots. Steamship Co. *vs.* Joliffe, 2 Wall., 450.

This case was decided by a vote of four justices to three, the opinion of the majority being written by Mr. Justice Field and the opinion of the minority by Mr. Justice Miller. The opinion of the majority held that the act did not purport to establish regulations for port pilotage or provide for the appointment, duties, responsibilities or compensation of such pilots; that the act was not intended to remedy any evils of the state regulations for port pilotage against which no complaints had been made, and that Congress could not have intended to annul or destroy the state regulations for port pilotage without substituting something in their place. The minority opinion held that the act was broad enough to provide for licensing port pilots as well as pilots for voyages, that the greatest need for pilotage regulation existed at the ports rather than on voyages, that Congress evidently intended that any pilot licensed as provided in the act should be competent to serve within the limits prescribed in his certificate, and that the express provision that "instead of the present system of pilotage the regulations of this act should be observed" clearly intended to abrogate the State systems of pilotage because there were no other systems at that time in existence.

It must be conceded that there was great force in the argument of the minority, and that Congress in passing this act thought that the security of lives of passengers would be better provided for by establishing a system of federal pilots to be examined and licensed by federal authorities, than if vessels were allowed to be piloted exclusively by State pilots and that there could have been no purpose in making any provision for federal pilots if there had been no complaint or ground for criticism of the State pilots.

This apparently was the view taken by Congress, because on July 25, 1866, it passed another act, entitled "An Act further to provide for the safety of the lives of passengers on board vessels propelled in whole or in part by steam, to regulate the salaries of steamboat inspectors and for other purposes," which contained the following provision not appearing in any previous act:

> SEC. 9. "And be it further enacted, That all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith, established for the government of steam vessels in passing, as provided in the twenty-ninth section of an act relating to steam vessels, approved the thirtieth day of August, eighteen hundred and fifty-two. *And every seagoing steam vessel now subject or hereby made subject to the navigation laws of the United States and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels;* vessels of other countries and public vessels of the United States only excepted."

The effect of this section was to place every seagoing steam vessel subject to the navigation laws of the United States and subject to the rules and regulations mentioned, when under way, except upon the high seas, under the exclusive control and direction of Federal pilots, and to wholly exclude State pilots from navigating any vessel of the class mentioned, except upon the high seas. This prac-

tically annulled and destroyed all State regulations and systems respecting port pilotage unless all State pilots obtained licenses from the Federal authorities. This must have caused great consternation among the State pilots, and State authorities generally, and undoubtedly worked considerable injustice, and caused inconveniences in navigation. If this act had remained in force it would have been necessary for the existing pilotage establishments of the various ports to change in substance from State establishments to Federal establishments, although there were no Federal laws expressly providing for such establishments. The burden would have been cast upon the pilots themselves of organizing in such a way as to furnish the necessary service and meet the expenses of maintaining the establishment in addition to obtaining Federal licenses.

These difficulties were evidently brought to the attention of Congress, because on February 25, 1867, it passed an act to amend § 9 of the Act of July 25, 1866, so as to add at the end thereof the following:

> "Provided, however, that nothing in this act or in the act of which it is amendatory shall be construed to annul or affect any regulation established by the EXISTING law of any state requiring vessels entering or leaving a port in such state to take a pilot duly licensed or authorized by the laws of such state or of a state situate upon the waters of the same port." (14 Stats. at Large, page 411.)

This reinstated the pilotage laws of the States which then existed, but did not permit the States to pass any new laws or make any changes in or additions to existing laws. The statutes remained in this form until February 28, 1871, when Congress passed another act entitled "An Act to pro-

vide for the better security of life on board vessels propelled in whole or in part by steam, and for other purposes," which contained among others the following sections:

"SEC. 14. And be it further enacted, That the inspectors shall license and classify the captains, chief mates, engineers, and pilots of all steam-vessels, and it shall be unlawful to employ any person, or for any person to serve as a captain, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and anyone so offending shall forfeit one hundred dollars for each offence; and no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of officers and crew, sufficient at all times to manage the vessel, including the proper number of watchmen: *Provided, however*, That if any such vessel, on her voyage, is deprived of the services of any licensed officer, without the consent, fault, or collusion of the master, owner, or of any person interested in the vessel, the deficiency may be temporarily supplied until others licensed can be obtained."

"SEC. 18. And be it further enacted, That whenever any person claiming to be a skillful pilot of steam-vessels shall offer himself for a license, the inspector (s) shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he shall offer, that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, or inattention to the duties of his station, or for intemperance, or the wilful violation of any provision of this act. And every such captain, mate, engineer, and pilot who shall receive a license

as aforesaid shall, when employed upon any such vessel, place his certificate of license (which shall be framed under glass) in some conspicuous place in such vessel, where it can be seen by passengers and others at all times; and for every neglect to comply with this provision by any such captain, mate, engineer, or pilot, he shall be subject to a penalty of one hundred dollars' fine, or to the revocation of his license: *Provided*, That in cases where the captain or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capactiy."

"Sec. 41. And be it further enacted, That all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this act: *Provided*, That this act shall not apply to public vessels of the United States or vessels of other countries, nor to boats, propelled in whole or in part by steam, for navigating canals."

"Sec. 51. And be it further enacted, That all *coastwise* seagoing vessels, and vessels(s) navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this act; and every *coastwise* seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register*, shall when under way, except on the high seas, be under the control and direction of pilots

licensed by the inspectors of steamboats. *And no State or municipal government shall impose upon pilots of steam vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed: Provided, however,* That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, *other than coastwise steam vessels,* to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

The provisions for the examination and licensing of pilots continued in substantially the same form as they had previously existed, and Congress still expressly retained its jurisdiction and control over all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors and other navigable waters of the United States, excepting only public vessels of the United States, vessels of foreign countries and boats propelled in whole or in part by steam for navigating canals.

Section 51 of this act corresponds to Section 9 of the Act of 1866 as amended in 1867, with certain modifications. The portions printed above in italics are new. In this section appears for the first time the expression "all coastwise seagoing vessels." This expression was evidently intended to include all seagoing vessels navigating the lakes, bays, inlets, sounds, rivers, harbors or other navi-

gable waters of the United States, and also all vessels sailing up and down either the Atlantic or Pacific Coast of the United States.

Section 51 of this act limits the class of vessels placed under the exclusive control and direction of Federal pilots.

Under the Act of 1866, as amended in 1867, every seagoing vessel subject to the Navigation Laws of the United States and to the rules and regulations mentioned, was placed under the control and direction of Federal pilots when under way, except upon the high seas, whereas Section 51 of the Act of 1871 places under the exclusive control of the Federal pilots only those seagoing steam vessels, subject to the Navigation Laws of the United States, and the rules and regulations mentioned, which are coastwise steam vessels, and are not sailing under register.

The provisions in Section 51 of the Act of 1871, that no State or municipal government should impose upon Federal pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States, and that no State should levy any pilot charge upon any steamer piloted as therein provided, were new, and had not appeared in any previous act. The latter provision was doubtless deemed necessary in view of the fact that certain classes of seagoing steam vessels which had previously been placed under the exclusive control of Federal pilots, were, by Section 51, removed and released from such *exclusive* control.

The proviso at the end of §51 differs from the corresponding proviso in the Act of 1866 inserted in §9 by the Amendatory Act of 1867, in that it omits the word "existing" before the words "laws of any State," and that it inserts the words "other than coastwise steam vessels" between the words "such State" and the words "to take a pilot." The

effect of this change was to permit the States to pass new laws or to change or add to their old laws requiring vessels entering or leaving port to take a State pilot, but it limited the scope of such laws, both those then existing and those which might thereafter be enacted, so that they should not apply to coastwise steam vessels.

Although the Act of 1871 expressly repeals the previous acts relating to the same subject-matter, it must be construed in the light of the old acts and as a continuance and modification or amendment thereof rather than as an entirely new enactment. For this reason §51 should not be held to change the law as it previously existed except insofar as the intention to make such changes clearly appears.

§51 should also be construed so as to give to all parts and provisions thereof some reasonable meaning and effect. The section should not be construed to enlarge the powers of the states to regulate pilotage any further than appears to have been clearly intended.

The fact that seagoing steam vessels are withdrawn from the *exclusive* control of federal pilots, if they are not coastwise or are sailing under register, should not be construed to give to the states *exclusive* power to regulate pilotage on such vessels unless that appears clearly to be the intention. It was clearly the intention of this act to give to the states power to compel vessels other than coastwise steam vessels to take a state pilot when entering or leaving port, but we submit it was not the intention of this act to give to the states a similar control over any coastwise steam vessels whether sailing under register or not.

As vessels sailing under register have since 1818 been expressly authorized to engage in trade between different ports of the United States (9 Stats. at Large 232; R. S., §3126), which must

include coasting trade, it is evident that Congress contemplated that some coastwise steam vessels might sail under register, and that others might sail under license, and that as licensed vessels could not engage in foreign trade it intended to retain under the exclusive control of federal pilots all licensed seagoing steam vessels except when on the high seas. Having provided, however, for the examination and licensing of pilots who should be competent to safely pilot steam vessels in and out of ports, and having placed a certain class of steam vessels under their exclusive control and direction for the purpose of better securing the life of passengers, Congress must have contemplated that in piloting other coastwise steam vessels in and out of port, which were sailing under register, the federal pilots would be equally competent, if not more competent, to promote the safety of life than state pilots. There is no reason to infer from the fact that Congress has removed coastwise steam vessels sailing under register from the *exclusive* control and direction of federal pilots that it has lost in any degree its confidence in the ability or competency of such pilots, or that such pilots are any less competent to navigate steam vessels sailing under register than steam vessels sailing under license when both are engaged in coastwise trade.

This view is confirmed and affirmatively expressed in the provisions of § 51 which prohibit the states from requiring any federal pilots to procure a state license, and from levying any pilot charges upon any steamer piloted as therein provided. The expression "piloted as herein provided" must mean piloted as provided in the Act of 1871 rather than as provided in § 51 of that act. There is no provision in § 51 for the examination or licensing of pilots. The provision for their examination and licensing appear in the preceding sections of the acts. Piloted as provided in

the Act of 1871 must mean piloted by a pilot who has been examined and licensed by Inspectors of Steamboats as provided therein. This construction is wholly reasonable and consistent with the other provisions of the statute, and it is in line with the obvious intention of Congress that the security of life would be promoted by the use of federal pilots in preference to state pilots. If a coastwise vessel sailing under register is under the control and direction of a federal pilot licensed to navigate in a particular port, how can it be possible that the security of life would be promoted in any way by compelling that vessel to take on a state pilot and submit itself to his control and direction? Congress having provided for the examination and licensing of federal pilots for the purpose of navigating steam vessels in and out of harbors, must have intended that their ability to perform this service would be at least equal to the ability of state pilots to perform the same service, and there is no reason for imputing to Congress an intention to permit a state to require the use of state pilots in preference to federal pilots licensed for the same service unless such an intention is clearly shown.

It may be asked however why Congress removed coastwise steam vessels sailing under register from the exclusive control and direction of Federal pilots. The answer is simple. In the first place the majority of such vessels would have occasion to stop for one purpose or another at foreign ports where they necessarily could not be under the control or direction of Federal pilots. In the second place the coastwise steam vessels which are engaged in the longest voyages are more likely to be registered than licensed, because of the greater chances of being obliged to stop at foreign ports, and on the longer voyages there is less chance that the pilot will hold Federal licenses for all ports at which the vessel may stop, and much greater chance

that the vessel will require the service of some local pilot when entering port. A pilot who could safely navigate a vessel in and out of the port of San Francisco would not be expected to have a license for the port of New York, although he might well be competent for other ports on the Pacific coast. The result is that if Congress had made the use of Federal pilots compulsory for all coastwise vessels sailing under register without creating a Federal establishment for port pilots, many of such vessels would have been forced to make special arrangements in advance with some local Federal pilot to meet them and safely take them into port.

It is accordingly clear that if the requirement that vessels must be under the control and direction of Federal pilots had remained broad enough to include coastwise steam vessels sailing under register and making the longer voyages, it would have subjected such vessels to considerable inconvenience and would have interfered unreasonably with navigation, not because any pilot holding a Federal license for any particular port would not be just as competent as a State pilot to take the vessel safely into that particular port, but because of the probabililty that such a vessel would not, upon reaching the port, have on board a pilot who held a Federal license for every port which it desired to enter, and that it would have greater difficulty in obtaining locally a Federal pilot than a State pilot when it actually arrived at and was ready to enter any port. This results from the fact that there have never been any local Federal establishments for port pilotage, and not because a Federal pilot holding a license for a particular port is not just as competent as a State pilot to safely navigate vessels therein. If any vessel had on board when arriving at any port a Federal pilot holding a license for

that port, Congress could not have intended that such a vessel could be required by any State to take a State pilot or pay any State pilot charge. The presumption is strongly against any such intention unless it is clearly shown.

We have already seen that the proviso clause added in 1867 to §9 of the Act of 1866 had substantially the effect of conferring back upon the states certain powers which had previously been taken away from the states, but only to the extent of existing statutes. The proviso clause of §51 is in effect an amendment or modification of the same clause of §9 of the Act of 1866. It had the effect of conferring back upon the states certain additional powers which had previously been taken away from them, to wit, the powers to enact new laws or change or modify their old laws requiring vessels other than coastwise steam vessels, when entering or leaving port, to take a state pilot. This clause cannot possibly be construed to confer upon the states any greater powers than are expressly mentioned. The section should be construed strictly against the states. The expression "coastwise steam vessels" cannot be limited for the benefit of the states because no limit is stated, and there is no reason for inferring that this expression means "coastwise steam vessels not sailing under register" because of the fact that the expression when used above in the same section had this limitation. In the first place the expression "coastwise seagoing vessels" appears in the first and second lines of the section without the limitation mentioned, and in the second place the fact that in one case Congress placed this limitation on the expression, whereas in the other case it did not do so, gives rise to the inference that Congress did not intend in the second case that it should be limited.

The provisions of the Act of February 28, 1871,

were codified in Revised Statutes, Title 52. The important sections are as follows:

> Rev. Stat. "Sec. 4401. All coastwise seagoing vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this Title; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, excepting on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."
>
> Rev. Stat. "Sec. 4412. Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this Title."
>
> Rev. Stat. "Sec. 4413. Where the master or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capacity."

> Rev. Stat. "Sec. 4444. No State or municipal government shall impose upon pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this Title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided *by this Title;* and in no case shall the fees charged for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State."

There is no substantial change between these provisions and the corresponding provisions in the Statute of 1871 if construed as we have contended. The provision in Section 4444 that no pilot charges shall be levied by any state "upon any steamer piloted as provided by this title" emphasizes and establishes our contention that the corresponding provision in Section 51 of the Act of 1871 was intended to prohibit the states from levying pilot charges upon steamers piloted by a pilot licensed as provided in the Act of 1871. If this prohibition were intended to apply only to steamers upon which federal pilotage was made compulsory, the prohibition in Section 4444 would undoubtedly have referred specifically to Section 4401 instead of to Title 52 generally. Any steamer is certainly piloted as provided in Title 52 if it is at the time under the control and direction of a pilot licensed by the federal authorities for the

particular voyage or port on or in which the steamer is sailing. This does not, we contend, change the meaning of the law, because the expression in Section 51 of the Act of 1871, "piloted as herein provided," clearly meant piloted as provided in the entire Act of 1871.

It is further significant that Section 4444 is entitled "State Regulation of Pilots" and that the provisions for the state regulation of pilots are contained in a section all by themselves. From this it may reasonably be inferred that Congress regarded that the states have no power to regulate pilots, except as provided in that section.

The appellants' contention that Congress intended to assume control over the pilotage of only licensed steam vessels and to leave the pilotage of all registered steam vessels for the several states to regulate, cannot be sustained without doing violence to certain provisions of Section 4444 and rendering nugatory and meaningless certain other provisions of that section. If Congress had intended to accomplish the result suggested by appellants, why didn't it say so? It would have been simple for Congress in 1871 or when codifying the laws into the Revised Statutes to say, if it had intended or desired to do so, that all steam vessels sailing under license should be under the control and direction of federal pilots, except when on the high seas, and that all other vessels should be subject to such pilotage regulations as the several states might adopt. The failure to accomplish a simple thing in a simple manner indicates clearly that it was not intended.

Ryan *v.* Carter, 93 U. S., 78, 83.
U. S. *v.* Ryder, 110 U. S., 739.
U. S. *v.* Chase, 135 U. S., 259.

Furthermore, the appellants' argument leads to an unreasonable and absurd result. If his conten-

tion was sustained, it would mean that a steam vessel sailing regularly between New York and Galveston without stopping *en route* at a foreign port would be subject exclusively to control by federal pilots when entering or leaving port, but that another steam vessel making substantially the same trip, which stopped regularly *en route* at some port or ports in the West Indies, would be subject exclusively to the control of state pilots when entering or leaving port. Such a distinction is certainly not necessary for the better security of the life of passengers, and Congress could not have intended such a result after making elaborate provision for examining and licensing pilots for service in the various ports, as well as for service on voyages.

It is obvious that the distinction which Congress had in mind was that between coastwise steam vessels and other vessels, and that it intended to place coastwise vessels under the control and direction of federal pilots in so far as it might be practicable and convenient in view of the customs and necessities of navigation, and that it did not intend that the power of the state to regulate the pilotage of any particular vessel should depend upon whether it was sailing under register or under license. Such a distinction would obviously be unreasonable because a vessel sailing under register might, and a great many of them undoubtedly do, engage in exactly the same trade as vessels sailing under license. The inclination of Congress to classify coastwise vessels sailing under register with coastwise vessels sailing under license is clearly indicated by Section 4361 of the Revised Statutes, which is a re-enactment with slight changes of Section 20 of Chapter 8 of an Act of February 18, 1793, 1 Stats. at Large 313, which makes vessels registered and employed in going from one dis-

trict in the United States to another district subject to the same regulations, provisions, penalties and forfeitures as are provided for vessels licensed for carrying on the coasting trade. This section as appearing in the Revised Statutes might well be held to place coastwise steam vessels sailing under register under the control and direction of federal pilots, except when on the high seas, if construed in such a way as to harmonize with Section 4401. This view was approved by Judge Ross in writing the prevailing opinion of the Circuit Court of Appeals in the present case in 186 Fed. Rep. 730. Such a construction would, however, render nugatory the words "not sailing under register" appearing in Section 4401. There can be no doubt, however, that Congress did not intend that the class of vessels described in Section 4361 should be subject to any pilot charges or other pilotage regulation by the states so long as there were piloted by Federal pilots.

None of the authorities relied on by the appellants are in conflict with our contentions.

In *Joslyn* v. *Nickerson*, it was held that a steam vessel sailing under register between Boston and Havana was not required by the statutes of Massachusetts to take a state pilot because that statute exempted steam vessels carrying a pilot licensed by the federal authorities and the steam vessel in question did carry such a pilot. This vessel was not a coastwise steam vessel at the time of the decision, because Cuba at that time (1880) was a foreign country. The dictum that a federal pilot was not compulsory except upon coastwise steam vessels not sailing under register was undoubtedly correct, but the dictum that the vessel would be bound by any law of Massachusetts which might require her to take a local pilot is, we submit, not correct. It was wholly unnecessary for the

decision of that case and the question was not carefully considered.

The case of *Murray* v. *Clark*, 4 Daly, 468; 58 N. Y., 684, is not entitled to any weight upon the question now at issue, because the court evidently gave no consideration to the history of the legislation of Congress upon the subject of pilotage and the attitude of the State Court was obviously to sustain the state statutes.

In Sprague *v.* Thompson, 118 U. S., 90, it was held that a coastwise steam vessel sailing under license engaged in trade between Philadelphia and Savannah was not bound by a statute of Georgia requiring vessels when entering the port of Savannah to accept the first pilot who offered his services, because at the time of the offer she was piloted as provided by Title 52 of the Revised Statutes. In this case the steamer was at the time of the offer of the first pilot's services on the high seas and under the control of a federal pilot licensed for the high seas, but before she entered the port she took on another federal pilot licensed for the port of Savannah. She was accordingly at all times piloted by a pilot licensed by the federal authorities for waters on which she was actually sailing. This decision sustains the construction of the prohibition contained in Section 4444 against States levying pilot charges upon vessels piloted as provided in Title 52, for which we have contended. The Court said:

> "The section (to wit, Section 4444) expressly excepts coastwise steam vessels from regulations established by the laws of any state requiring vessels entering or leaving a port in any such state to take a pilot * * * The owners of the Saxon were therefore at liberty to employ any pilot licensed under the authority of the United States for the particular service in which he was engaged, without regard to the provisions of the

> Georgia Code requiring it to accept the services of the pilot first tendered, or in case of refusal to pay pilotage therefor."

In Bigley *v.* Steamship Co., 105 Fed. Rep., 74, and Huns *v.* Steamship Co., 182 U. S., 392, it was merely held that a steamer sailing between New York and Porto Rico, after the treaty with Spain, was engaged in coasting trade and a coastwise steam vessel not sailing under register, and that it was exempted from State pilotage regulation. The Supreme Court, after quoting Sections 4235, 4237, 4401 and 4444 of the Revised Statutes, said:

> "The chief object of these provisions seems to be to license pilots upon steam vessels engaged in coastwise or interior commerce of the country and at the same time to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce."

This confirms the contention that Congress considered federal pilots adequate and competent for all coastwise steam vessels, regardless of whether they were sailing under register or under license.

In Olsen *v.* Smith, 195 U. S., 332, the Supreme Court clearly indicated on page 343 that Section 4444 had the effect of exempting and withdrawing all coastwise steam vessels from state pilotage regulations.

POINT II.

The steamers "Queen" and "Umatilla" are coastwise steam vessels, and were at the times mentioned in the certificate piloted as provided in Title 52 of the Revised Statutes, and accordingly not subject to the pilot charges levied by the California Act of 1905.

The certificate of the Circuit Court of Appeals states that the Steamers *Queen* and *Umatilla* were regularly sailing under register, and were either on a voyage from the Port of San Francisco to a United States port on Puget Sound, or from a United States port on Puget Sound to the Port of San Francisco, but that in either such case the steamers did, while en route between said ports of the United States, stop at the Port of Victoria, B. C., and that they carried, delivered and received passengers, mail and freight to and from the Port of Victoria; that the steamers sailed direct to Victoria from San Francisco and direct from Victoria to San Francisco; that at least ninety per cent. of the passengers and cargo of these steamers was carried between United States ports, and that the voyages for which the steamers cleared were between San Francisco and Puget Sound ports of the United States, or *vice versa*, with the right to stop and trade en route at Victoria; and that the stop at Victoria on each occasion was for about an hour (pp. 1 and 2). The same facts are assumed in the Fourth Question certified. The First and Second Questions certified, as well as the opinions of the Judges of the Court of Appeals, seem to assume that the steamers *Queen* and *Umatilla* were coast-

wise steam vessels. The appellants, however, apparently contend, in their Fifth Point, that these steamers were not coastwise steam vesels, because they stopped at and were to some extent engaged in trade with the foreign port of Victoria.

This contention is somewhat surprising, in view of the fact that the appellants have, all through the early part of their brief, referred to the long voyages which coastwise vessels sailing under register might make, and to the fact that they might have occasion to stop at and might incidentally engage in trade with foreign ports. Appellants clearly recognize, in the earlier pages of their brief, that many coastwise vessels sail under register for the express purpose of being able to stop at foreign ports, and that they are no less coastwise vessels because of the fact that they do stop and incidentally trade at foreign ports. Appellants go so far as to say that the trade between San Francisco and New York is coastwise trade, even though vessels engaged in it are obliged to go around South America and pass along the coast of many foreign countries, and must necessarily stop at foreign ports on the way (pp. 6, 12-16). They refer specifically to an Act of Congress of March 28, 1854, Chap. 30; 10 Stats. at Large, 272; R. S. Sec. 2999; which referred to trade between ports of the United States on the Pacific and the Atlantic by the Panama Railway as coastwise trade. Other statutes might be referred to in which Congress has recognized that trade between United States ports and ports of Alaska, Hawaii and Porto Rico is coastwise trade, as distinguished from foreign trade (R. S., Sec. 4358; 31 Stats. at Large, 79; 141-161). Vessels engaged in making voyages to and trading with Alaska, Hawaii and Porto Rico are held to be coastwise vessels within the meaning of Section 4444. *Huus* v. *Steamship Company*, 105 Fed. Rep., 74; 182 U. S., 392.

Both Congress and the Courts have shown an inclination to give to coastwise trade and coastwise vessels a broad interpretation. Coastwise trade and coastwise vessels would, in their ordinary and primary meaning, include trade along a coast, and vessels making voyages along a coast, but Congress and the Courts have gone further, and apparently held that coastwise trade and coastwise vessels include trade between and vessels making voyages between any two American ports, even though the trade and voyages be not strictly along the coast. This extension of the meaning of the expressions cannot, however, be held to deprive them of their natural and ordinary meaning. Vessels making voyages along the coast of the United States between ports of the United States are certainly coastwise vessels.

Even while contending that the steamers in question are not coastwise vessels, appellants state that "it is the character of the *voyage* and not the *cargo* that determines the meaning of the phrase "*coastwise vessels*" in R. S., 4414" (Appellants' Brief, p. 43, top). With this statement, we agree to the extent that the character of the voyage is vastly more important than the character of the cargo. In other words, the controlling consideration is whether the voyage is a coastwise voyage; whether it begins and ends at ports of the United States, and whether it is along the coast of the United States. If the voyage begins and ends at ports of the United States, and is wholly along the coast of the United States, the vessel engaged in it is certainly a coastwise vessel beyond peradventure of doubt, regardless of the character or nationality of the cargo and passengers.

The certificate states and the questions certified assume that the stops made at and the trade with Victoria were en route, and only incidental to the voyages and trade of the steamers between San

Francisco and Puget Sound ports of the United States. The Puget Sound ports referred to undoubtedly include Port Townsend, Seattle and Tacoma. A reference to the map shows that this voyage, from start to finish, was along the coast of the United States, partly on the high seas and partly through inland waters, and that Victoria was directly on the way; that it was unnecessary for these steamers to pass more than a few miles out of a straight course in order to stop at Victoria; and that this port could not on any theory either of fact or at law be regarded as the beginning or ending of the voyage. These steamers, when leaving San Francisco, cleared for ports on Puget Sound, which was proper and natural, because these ports were the natural terminus of the contemplated voyage. When they left Puget Sound ports they cleared for San Francisco, which was natural and proper for the same reason. These voyages were typical coastwise voyages.

The coasting trade includes trade between any two places in the United States, whether on the seacoast or on a navigable river.

Gibbons *v.* Ogden, 9 Wheaton, 214.
Steamboat Co. *v.* Livingston, 3 Cowan, 747.
Ravesies *v.* U. S., Circuit Court, Ala., 1889, 37 Fed. Rep., 447.

The fact that not more than one-tenth of the passengers and cargo of these steamers was carried to and from Victoria precludes the possibility of an argument that because these vessels were engaged to some extent in trade with a foreign port they are not coastwise vessels. Practically all of their trade was with domestic ports, which is enough to make them coastwise vessels even if the character or nationality of the cargo or passengers has any bearing on the question. The important

point, however, is that the stops and trading at Victoria were purely incidental to the voyages and trade between ports of the United States, which was the dominating and controlling purpose of the voyages.

The certificate states, and the questions certified assume, that the steamers *Queen* and *Umatilla* were, when entering and leaving the Port of San Francisco, in fact piloted by an officer holding a federal pilot's license. This must be considered to mean a license for the Port of San Francisco. These facts are sufficient to bring the California Statute of 1905 within the prohibition contained in Section 4444. The California Statute in question is of exactly the kind and character contemplated by and intended to be condemned by this prohibition. Nor does the statute fall within the proviso at the end of Section 4444. The statute does not require any vessel "to take a pilot," but it does levy pilot charges. This statute is accordingly not only void when applied to coastwise vessels piloted by an officer holding a federal pilot's license, but it is void even when applied to vessels other than coastwise, because it does not require such vessels "to take a pilot." The prohibition was directed against the levy of pilot charges by any State *upon any steamer* piloted as provided in Title 52. The proviso qualified this prohibition only to the extent of permitting States to require vessels other than coastwise steam vessels to take a State pilot. The result is that any statute of a State which levies a pilot charge but does not require a vessel to take a pilot is void as applied to any steamer piloted at the time by a federal pilot. The California Statute was not in existence in 1867, and accordingly the power of the State to pass it depends entirely upon the proviso clause in Section 4444, which must be construed strictly against the State, because it has the practical effect of conferring power

upon rather than taking power away from the States.

The unreasonableness and absurdity of the appellants' argument appears, when we realize that if the steamers *Queen* and *Umatilla* did not stop at Victoria in the course of their voyages between San Francisco and Puget Sound ports, they could unquestionably be piloted in and out of the Port of San Francisco by Federal pilots. How can the question whether they stop or not at Victoria have any bearing whatever upon the ability or competency of the officers of these steamers, who hold Federal pilots' licenses, to pilot them in and out of the Port of San Francisco? How can it be assumed, even for a moment, that Congress would have intended such an insignificant fact to determine whether a vessel should be piloted by a Federal or State pilot?

POINT III.

The First, Second and Fourth Questions Certified should be answered in the affirmative.

If our contentions made in Point I of this brief are sustained, it is clear that the First and Second Questions Certified must be answered in the affirmative. If our contentions made in Point II of this brief are sustained, the Fourth Question Certified must be answered in the affirmative.

POINT IV.

The Third Question Certified cannot be answered in the affirmative or the negative.

This question is, in effect, Are registered steam vessels, engaged in commerce with both foreign and domestic ports on the same voyage, coastwise vessels? The answer to the question whether a vessel is a coastwise vessel or not obviously depends upon other considerations than the question whether it is engaged in foreign as well as domestic commerce. The fact that it is engaged to some extent in foreign commerce does not prevent a vessel from being a coastwise vessel, and the fact that it is engaged to some extent in domestic commerce does not necessarily make it a coastwise vessel. For instance, a steamer sailing from New York to Liverpool, which stopped at Boston on the way, might be engaged in domestic commerce to a certain extent, but it would certainly not be a coastwise vessel, because its real voyage and its principal business would be between New York and a foreign port.

We, accordingly, do not see how it is possible to answer the Third Question Certified either in the affirmative or the negative, because the facts assumed are insufficient to determine the question.

Respectfully submitted,

GEORGE W. TOWLE,
Proctor for Appellees.

THOMAS THACHER, GRAHAM SUMNER,
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B. DUER,
Of Counsel.

IN THE

Supreme Court of the ~~United States.~~

No. 641.

M. ANDERSON, *Appellant,*

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION) CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, *Appellee.*

No. 642.

N. JORDAN, *Appellant,*

vs.

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, *Appellee.*

SUPPLEMENTAL BRIEF FOR APPELLEES.

GEORGE W. TOWLE,
Proctor for Appellees.

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THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States.

M. ANDERSON, Appellant, vs. THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship *Queen*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 641.
N. JORDAN, Appellant, vs. THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship *Umatilla*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 642.

SUPPLEMENTAL BRIEF FOR APPELLEES.

We have just received the appellants' reply brief and fear that we have failed to express clearly in our main brief or the oral argument certain of

the contentions which we desire to make. We accordingly wish to avail ourselves of the permission of the Court to file an additional brief. We repeat herein the substance of certain arguments contained in our main brief, but cannot of course attempt to cover all the points mentioned therein.

The four questions certified by the Circuit Court of Appeals involve the construction of §§ 4401 and 4444 of the Revised Statutes. Two questions are raised: First, whether the expression "coastwise vessels" appearing in these sections means (*a*) only vessels licensed for and engaged exclusively in the coasting trade, or (*b*) vessels engaged exclusively in the coasting trade, whether licensed or registered, or (*c*) vessels engaged in making coastwise voyages, whether licensed or registered, even though they stop en route and trade incidentally at foreign ports; and Second, whether the States have power to regulate the pilotage of any coastwise vessels.

We have contended that the expression "coastwise vessels" appearing in these two sections means vessels engaged in making coastwise voyages, and that a voyage from one port to another of the United States is a coastwise voyage, even though the vessel stops en route and trades incidentally at a foreign port, and that the States have no power to regulate the pilotage of any such vessels if they are in fact piloted by Federal pilots. We base this contention first upon the proposition that no other construction would give a reasonable or intelligent meaning and effect to all the provisions of §§ 4401 and 4444, and second, upon the proposition that, in view of the history of the legislation of Congress upon the subject of pilotage, it should be held that the States have no power to regulate port pilotage of any seagoing vessels subject to the navigation laws of the United States except as provided by § 4444, expressly or by necessary implication.

The appellants, however, contend that the States have power to regulate the port pilotage of all vessels except as provided by § 51 of the Act of 1871, and that the only limitation upon the power of the States is with respect to "coastwise steam vessels, not sailing under register" or steam vessels licensed for and engaged exclusively in the coasting trade. They contend that the States can regulate the port pilotage of all registered vessels.

We contend that the same result should be reached whether the argument be based upon § 4401 and § 4444 as they now appear in the Revised Statutes, or upon § 51 of the Act of 1871.

The expression "coastwise vessels" appears three times in § 51 of the Act of 1871, which provides in substance first, that *all* coastwise seagoing vessels and vessels navigating the Great Lakes shall be subject to the navigation laws of the United States; second, that every coastwise seagoing *steam* vessel subject to the navigation laws of the United States, *not sailing under register*, shall when under way, except on the high seas, be under the control and direction of federal pilots; and, third, that the States may require vessels, other than coastwise *steam* vessels, to take a state pilot when entering or leaving port.

On the first occasion where this expression is used it must include *all* coastwise seagoing vessels, whether registered or licensed, and whether they are steam vessels or sailing vessels. No reason can be suggested for limiting this expression to those vessels only which are licensed and are not registered. It would be wholly unreasonable to suppose that Congress did not intend to make registered as well as licensed vessels subject to the navigation laws of the United States when navigating within the jurisdiction thereof. Section 11 of the Act of 1871 shows that all steam vessels navigating waters over which the United States has

jurisdiction were intended to be subject to the provisions of the Act, with the exception of public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals.

On the second occasion where this expression is used it is limited to coastwise vessels which are *steam* vessels, as distinguished from sailing vessels, and which are *not sailing under register*. The class of vessels which is placed under the exclusive control of federal pilots, except when on the high seas, is accordingly much narrower than the class of vessels which is made subject to the navigation laws of the United States. The vessels navigating the Great Lakes are made subject to the navigation laws, but are not placed under the exclusive control of federal pilots.

On the third occasion where this expression is used it is limited only to *steam* vessels. The expression "coastwise steam vessels" in the latter part of § 51, clearly does not include sailing vessels, but clearly does include all other coastwise vessels which are included in the first clause of the section.

It cannot be presumed that Congress, when using this expression three times in the same section of an Act, on some occasions with limitations, and on other occasions without limitations, intended that any limitations not expressed should be supplied by inference.

These circumstances show that Congress contemplated that some coastwise vessels might be registered, and that others might be licensed. The same thing is shown by § 3126 enacted May 27, 1848 (9 Stats. at Large, 232) which authorizes any *registered* vessel to engage in trade between ports of the United States; by § 1220, enacted July, 1870 (16 Stats. at Large, 269), which provides that certain vessels trading between ports of the United

States shall not be subject to tonnage tax or duty if they are licensed, *registered* or enrolled; by § 4361, enacted February 18, 1793 (1 Stats. at Large, 313) which provides that *registered* vessels employed in going from one district to another in the United States shall be subject to the same regulations, provisions, etc., as are provided for vessels licensed for carrying on coasting trade. The substance of these three sections were in force as laws of the United States at the time of the enactment of the Act of 1871, and must be taken into consideration when considering the meaning of the expression "coastwise vessels" appearing in § 51 of the latter act.

Congress has repeatedly recognized that coastwise vessels may stop incidentally and trade at foreign ports, and that if such stops and such trade are en route or incidental to a voyage between ports of the United States the vessels are nevertheless coastwise vessels. § 3126 authorizes *registered* vessels to engage in trade between ports of the United States "with the privilege of touching at one or more foreign port *during the voyage*" and to "land and take in thereat merchandise, passengers and their baggage and letters and mails." § 3127, enacted at the same time as § 3126, to wit, May 27, 1818 (9 Stats. at Large, 232) exempts foreign merchandise carried in registered vessels from one port to another of the United States from the payment of import duties, even though the vessels in which they are carried may have "touched at a foreign port *during the voyage*." These sections, as well as § 4361, show clearly the inclination of Congress to classify registered vessels making coastwise voyages, which stop at foreign ports during the voyages, as coastwise vessels, rather than vessels engaged in foreign trade.

§4513, enacted June 7, 1872 (19 Stats. at Large, 261), provides that §4511 relating to shipping

articles shall not apply "to masters of coastwise nor to masters of lake-going vessels that touch at foreign ports." This is an unequivocal declaration by Congress that vessels which touch at foreign ports may, nevertheless, be coastwise vessels.

It has been held by the Supreme Court of Massachusetts, in construing pilotage statutes of that State, that vessels might be "coasters" or might be "engaged regularly in the coasting trade," even though they were sailing under register and were engaged to some extent in trade with foreign ports.

Wilson *v.* Gray, 127 Mass., 98.
Tilley *v.* Farrow, 14 Mass., 17.

See also

Hall *v.* Deenir, 91 U. S., 485.

We contend that the provision in § 4444 to the effect that no pilot charges shall be levied by any State upon any steam vessel piloted as provided in Title 52, means that no such charges shall be levied upon any steamer piloted by a pilot, provided for in Title 52. The pilots provided for in that title are those examined and licensed by the inspectors of steam boats. These inspectors are required by § 4438 to license and qualify pilots of all steam vessels. The same section makes it unlawful to employ any person, or for any person to serve as a pilot of any steamer, who is not licensed by the inspectors. Substantially the same provisions were contained in § 14 of the Act of 1871. §4442, substantially a re-enactment of § 18 of the Act of 1871, authorizes the inspectors to grant to pilots licenses for the term of one year to pilot steam vessels within the limits prescribed in the license. This contemplates that the licenses should be limited both as to time and as to the waters with respect to which the pilots prove themselves to be qualified. A steamer is certainly piloted as provided in Title 52 if it is piloted by a pilot licensed by the in-

spectors of steamboats for the time in which and the particular waters upon which the steamer is sailing.

The result is that coastwise steam vessels when entering or leaving port must be piloted by federal pilots if they are not sailing under register; they may be piloted by such pilots if they are sailing under register, and if they are so piloted they cannot be compelled by the States to pay any pilot charges. It follows by implication that a coastwise steam vessel sailing under register which is not piloted by a federal pilot may be compelled by the State to take a State pilot when entering or leaving port. Vessels other than coastwise steam vessels may be required by the States to take a State pilot when entering or leaving port. This construction gives a reasonable and intelligent meaning to all provisions of the sections in question, and gives to the States such powers with respect to port pilotage as are provided in § 4444, expressly or by necessary implication, and no other powers.

The appellants apparently agree with us with respect to the meaning of the expression "coastwise vessels." They frankly recognize that "coastwise vessels" may be registered and may stop en route and trade incidentally at foreign ports, but contend that Congress intended that Federal pilots should pilot in and out of ports the licensed coastwise vessels, making presumably the shorter voyages, but not the registered coastwise vessels, making presumably the longer voyages (Reply Brief, pp. 6-10). The appellants accordingly contend that States have power to regulate the port pilotage of *some* coastwise vessels, to wit, those sailing under register.

The argument that Congress did not intend that a Federal pilot should pilot a registered vessel in and out of a port after being away some time on a comparatively long voyage is artificial and not sup-

ported by anything in the statutes. The Federal pilots are licensed *for a limited time* and a limited territory and Congress by making the limit *one year* clearly indicated that it was not necessary for pilots to be examined oftener than once a year to make sure that they were familiar with the existing conditions. There is nothing in the statutes to indicate that a pilot holding a license for a particular port should not go away from it for more than a week or a month at a time or that if he did so he would be any less qualified to act as pilot when he came back. So far as anything that Congress has said is concerned he might go away for ten months and still be qualified to act during the other two months of the year. Congress undoubtedly knew of the possibilities of changes in the bars or currents which the appellants refer to, but did not think them of sufficient importance to require the Federal pilots with port licenses to be always at or near the port. If Congress had felt that these possibilities of changes were as dangerous as appellants contend, she would probably have established a system of port pilotage establishments, and certainly would not have made the use of Federal pilots *compulsory* on any coastwise vessels. Those even which do not sail under register, such for instance as the steamers sailing from New York to New Orleans or Galveston, may often be away from any one port a month or more at a time, and yet they are *expressly required* by Congress to use Federal pilots when entering or leaving ports, and are not permitted to accept at such times the services of a State pilot not holding a Federal license.

The appellant's argument cannot be reconciled with the language of § 51 of the Act of 1871, and R. S., §§ 4401 and 4444 except by holding that the States have full power to regulate port pilotage *except as limited* by these sections, that the only limi-

tation applies to "coastwise vessels not sailing under register," and that the proviso at the end of § 51 and § 4444 means nothing at all and is wholly unnecessary. Appellants have failed in their reply brief to suggest any meaning for this proviso. If the words "not sailing under register" were supplied out of the whole cloth to limit the words "coastwise steam vessels" the proviso would be a complement to § 4401, but would still, on appellants' construction, be wholly unnecessary.

The appellants argue that the prohibition against the levy of pilot charges by the States was intended merely to protect the coastwise vessels not sailing under register which were required to have federal pilots. For such a purpose the prohibition was clearly unnecessary because no State could in any way regulate the pilotage of a vessel which was regulated by Congress.

No such prohibition was considered necessary by Congress prior to 1871 when *all* seagoing steam vessels subject to the navigation laws were required to use Federal pilots when entering or leaving ports, except for the laws of the States existing in 1867. This prohibition was inserted in 1871 for a distinct purpose when the class of vessels subject to the *exclusive* control of Federal pilots was limited, and when the States were given power to pass new laws or to amend or modify their old laws so as to require vessels other than "coastwise steam vessels" to take a pilot. This prohibition was inserted to protect the coastwise steam vessels which were sailing under register, and which had Federal pilots for the various ports at which they stopped, from the levy by the States of unnecessary and burdensome charges. It was to protect a class of vessels *not otherwise protected* from such interference by the States. The levy of pilot charges in cases where the services of a pilot are not needed is cer-

tainly a pernicious form of taxation, and practically "graft" for the state pilots, and Congress could reasonably be expected to give protection to all vessels which had licensed and qualified Federal pilots, and did not need the services of any local port pilots.

It must be presumed that Congress intended that pilots licensed by the inspectors of steamboats would be fully competent to pilot vessels during the term and within the limits of their licenses, and that Congress did not intend that any vessel piloted by such a pilot should be subjected to any pilotage regulation by the States, except in cases where Congress has indicated that the States might regulate. There could be no purpose in providing Federal pilots for port work if they were to be superseded by State pilots for the vessels in which Congress was chiefly interested—to wit, coastwise steam vessels. It was this class which Congress had chiefly in mind and to which its regulations, contained in the Act of 1852 and 1871 and Title 52 of the Revised Statutes, chiefly apply.

The appellant's contention that the words "Existing laws" in the proviso of § 9 of the Act of 1866 as amended in 1867 meant laws existing at the time any vessel might be "entering or leaving port" is far-fetched and unsound. Such was not the intention of Congress. It appears that when the amendment of 1867 was before the Senate it was stated by Senator Morgan, who brought up the bill for consideration on February 19, 1867, that the only new provision in it was contained in a proviso at the end of the bill which "exempted from the provisions of the act of last year such States as have pilot laws *already* that are satisfactory."

The Congressional Globe, Second Session, 39th Congress, Part III, page 1554.

This confirms our contention that the effect of the amendment was merely to reinstate the laws of the States which were *then* in existence, and that it did not give back to the States power to pass any new laws or to amend or modify their old laws relating to pilotage.

The appellants misunderstand the point of our argument based upon the history of the legislation of Congress upon the subject of pilotage. We contend that the Act of 1866 superceded all State regulations for port pilotage of seagoing vessels subject to the navigation laws of the United States, that the Amendment of 1867 reinstated the laws of the States *then* existing requiring vessels entering or leaving port to take a State pilot, and that the Act of 1871 enlarged the powers of the States in so far as it authorized them to pass new laws or amend or modify their old laws so as to levy pilot charges upon coastwise steam vessels not piloted by Federal pilots and to compel vessels other than coastwise steam vessels to take a State pilot. This Act of 1871 necessarily superceded and limited any State pilotage laws existing in 1867 which affected coastwise vessels, not sailing under register, or other coastwise vessels piloted by Federal pilots. In so far, however, as this Act permitted new legislation by the States it enlarged their powers and should not be construed to confer any greater powers than are clearly indicated. The Statute of California involved in this case was new legislation because it was passed in 1905.

While it may be true, as a general rule, that Congress cannot confer legislative powers upon the States in view of the fact that the States have all legislative powers which are not limited or conferred exclusively upon Congress by the Constitution, there are many cases in which legislation by Congress has the effect of increasing or diminishing the powers of the States. This happens in cases

like the present, where Congress and the States have concurrent powers of legislation upon the same subject-matter. In such cases the powers of the States are superceded as soon as and to such extent as Congress legislates, but as soon as Congress repeals or limits the scope of its legislation the powers of the States are revived and may be exercised. The State pilotage laws which are superceded by inconsistent acts of Congress lie dormant as long as the acts of Congress are in force. Upon repeal or modification of the acts of Congress the State laws regain *pro tanto* their original force and effect. The China, 7 Wall., 53; *Ex parte* McNeill, 13 Wall., 236; Wilson *v.* McNamee, 102 U. S., 572; Cooley *v.* Portwardens, 12 Wall., 299.

The result is that whenever Congress by amendment of an earlier act limits the scope of its legislation, it indirectly enlarges the scope of the legislation which the States may lawfully enact, and our point is that such an amendment by Congress of an earlier act should be construed to limit the scope of its legislation, and correspondingly increase the scope of the State legislation, only to such extent as Congress indicates clearly or by necessary implication.

It is most important to consider § 51 of the Act of 1871 side by side with § 9 of the Act of 1866 as amended in 1867. The prohibitions contained in § 51, which are italicized on page 17 of our main brief, were clearly inserted because of the fact that the exclusive control of Federal pilots was limited to coastwise steam vessels not sailing under register. These prohibitions were intended to cover coastwise steam vessels sailing under register, and to exempt them from interference by the States so long as they were piloted by Federal pilots, and it was not the intention of Congress to place this class of vessels under the exclusive control of Federal pilots or the exclusive control of State pilots.

It was clearly intended to give to this class of vessels the option to use a Federal or a State pilot, when entering or leaving port, in view of the fact that it would have been unjust to compel them to use a Federal pilot if they did not have one regularly on board, but equally unjust to compel them to use a State pilot or pay unnecessary charges if they did have a Federal pilot on board.

It was suggested by the Chief Justice on the argument that the purpose of the pilotage legislation of Congress was to exempt vessels which were constantly entering and leaving ports of the United States on regular trips whose regular officers were fully competent to pilot them in and out of such ports from accepting the services of local pilots which were wholly unnecessary, or from paying pilot charges without receiving any benefit therefor. We submit that whether the purpose of Congress was to exempt such vessels from the payment of unnecessary pilot charges, or to promote the safety of life, neither purpose can be accomplished by accepting the appellants construction and holding that appellees' steamboats are liable to pay the pilot charges levied by the California statute of 1905 involved in this case.

The steamers *Queen* and *Umatilla* were making regular trips from San Francisco to Puget Sound, and the time consumed in making each trip was less than two weeks (Record, Anderson *v.* Pac. Coast S. S. Co., Schedules B and C, pp. 38 to 52). Each of the masters and first officers of these vessels was duly licensed by the inspectors of steamboats to serve as master and pilot when entering and departing from the port of San Francisco, and each of said masters had for two years or more many times safely, and without the assistance of any state pilot navigated and piloted vessels out of and into the port of San Francisco, and no master

of any vessel owned or employed by either of the appellees and sailing under register had ever, during the period of twenty years, accepted the services of any state pilot to pilot any such vessel out of or into the port of San Francisco (same Record, p. 26). The amount of the pilotage fees which would be payable under the California statute, if valid, would be on an average of $110 per month for the steamer *Queen* and $120 for the steamer *Umatilla* (pp. 28, 29). These steamers had absolutely no use for the services of any State pilots when entering or leaving the port of San Francisco. The California statute permits them to enter and leave port under control of their own officers, if they pay the full State pilot charges. The levy and payment of these charges does not promote the safety of life or accomplish any useful purpose. They merely enrich the State pilots. The appellees' steamers accordingly fall within the class which Congress had in mind and intended to protect from annoying and burdensome interference by the States.

The acts of Congress should not be construed to permit the States to levy such wholly useless and burdensome charges when they are susceptible of a construction which is far more reasonable and just.

It does not appear that the federal pilotage laws have received any construction by conduct or acquiescence which is of assistance in this case. Most of the states except from their own pilotage laws "coasters" or "coastwise vessels." Some of them except "vessels employed in and licensed for the coasting trade." Three of the states seem to recognize that vessels carrying federal pilots are exempted by Congress from state pilotage regulations. Massachusetts excepts from its pilotage laws "steam vessels regulated by the laws of the United States and carrying a pilot commissioned by the United

States Commissioners." (Rev. Stats. of Mass. 1902, Vol. 1, page 609, Chap. 67.) Rhode Island excepts from its pilotage laws "passenger steam vessels regulated by United States laws, and carrying a United States pilot." (Genl. Laws of Rhode Island, 1909, Chap. 143, p. 510.) Virginia excepts from its pilotage laws coasting vessels "having a pilot license," which presumably means a federal pilot's license. (Code of Va., 1904, §1965.)

We have made diligent inquiry but have not been able to find that there is any line of steamers which are now sailing under register on voyages analogous to those made by the appellees' steamers. There are no other steam vessels engaged in the coasting trade touching en route at a foreign port and sailing under register out of or into the port of San Francisco. (See record Anderson *v.* Pacific Coast SS. Co., pp. 27, 28.) This explains why the questions raised in this case have not been raised before, and it is not fair to infer that steamship companies situated like the appellees' have in the past acquiesced in or submitted to state pilotage regulations similar to those now existing in California. We have looked into this matter because of a question asked on the argument by one of the members of the Court.

Respectfully submitted,

GEORGE W. TOWLE,
Proctor for Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
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LELAND B. DUER, of Counsel.

No.

In the Supreme Court

OF THE

United States.

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen," her tackle, apparel, etc.,
Petitioner,

vs.

M. ANDERSON, Libelant of said S. S. "Queen," etc.,
Respondent.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla," her tackle, apparel, etc.,
Petitioner,

vs.

N. JORDAN, Libelant of said S. S. "Umatilla," etc.,
Respondent.

In the Matter of the Libel of *M. Anderson* v. *S. S. "Queen," etc.;* and the Libel of *N. Jordan* v. *S. S. "Umatilla,"* for pilotage fees.

Petition, under the Act of Congress of March 3, 1891, of Pacific Coast Steamship Company, a corporation, claimant and appellee in case No. 641, and petition of

The Pacific Coast Company, a corporation, claimant and appellee in case No. 642, on the records of the Supreme Court of the United States, for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit commanding that it certify before the Supreme Court of the United States the entire record in each of two certain proceedings, to wit, in Nos. 1850 and 1851 on the records of said Court of Appeals.

Petition to Supreme Court of the United States Under the Act of Congress of March 3, 1891, for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Supreme Court of the United States:

Your petitioners, Pacific Coast Steamship Company, a corporation, claimant and appellee in case No. 641; and The Pacific Coast Company, a corporation, claimant and appellee in case No. 642 on the records of this Court—those proceedings being respectively questions certified to this Court in Nos. 1850 and 1851 on the records of the United States Circuit Court of Appeals for the Ninth Circuit—present to this Court this their petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the clerk thereof to certify to the Supreme Court of the United States the record and proceedings in those two certain cases pending before it entitled

"M. Anderson (Libelant),

Appellant,

vs.

The Pacific Coast Steamship Company (a corporation), Claimant of the Steamship 'Queen', her engines, boilers, machinery, tackle, apparel and furniture (Respondent),

Appellee."

and

"N. Jordan (Libellant),

Appellant,

vs.

The Pacific Coast Company (a corporation), Claimant of the Steamship 'Umatilla', her engines, boilers, machinery, tackle, apparel and furniture (Respondent),

Appellee."

the same being respectively Nos. 1850 and 1851 on the records of said Court of Appeals, together with its opinion in each of said cases, for the review and determination of said causes by the Supreme Court of the United States, as provided in Section 6 of the Act of Congress approved March 3, 1891; and your petitioners respectfully represent as follows:

1. That certain questions arising from the records in the above proceedings Nos. 1850 and 1851 on the records of the United States Circuit Court of Appeals for the Ninth Circuit were heretofore, by the said Court of Appeals, duly certified to the Supreme Court of the United States for its decision thereof—the same being on the records of this Court the above numbered pro-

ceedings 641 and 642—and that the questions so certified have been placed on the calendar of this Court for hearing on February 19, 1912.

2. That there are other questions arising from such records—Nos. 1850 and 1851 on the records of said Court of Appeals—which have not been so certified—upon none of which has the said Court of Appeals expressed an opinion—each of which questions is material and may need be decided before the rights of the respective parties to the aforesaid proceedings can be finally determined.

3. *That there is no controversy in either of said proceedings regarding any fact*—on the contrary the facts are all agreed to by a stipulation of record, a full and true copy of which appears on pages 21 to 37 of the record in the proceedings of *M. Anderson* v. *Pacific Coast Steamship Company*, claimant of the S. S. "Queen," No. 1850 on the records of said Court of Appeals.

4. That said two proceedings were consolidated for trial in the U. S. District Court for the Northern District of California, and have so continued in all proceedings therein since then had.

5. That the record in each case is brief: That each of said proceedings was *in rem*, against the vessel.

6. That the claim asserted by libelant in each of said proceedings is for a pilotage fee under a statute of the State of California—the pilots' services not having been accepted by, and no pilotage service rendered to, either of said vessels or the masters thereof.

7. That the statutes of the State of California relating to pilotage, so far as here material, read as follows:

Section 2432, Political Code:

"All vessels, their tackle, apparel, and furniture, and the masters and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

Section 2439, Political Code:

"Any person not the master or owner, and not holding a commission or license as a pilot, who pilots any vessel into or out of any harbor or port of this state for which there are commissioned or licensed pilots, must be punished therefor as provided in the Penal Code, section three hundred and seventy-nine, and must pay to the pilot entitled to pilot such vessel the amount of pilotage or towage collected by him."

Section 2440, Political Code:

"There must be appointed by the governor, by and within the advice of the senate, three experienced and competent shipmasters or nautical men, citizens of the United States, and residents in either of the cities of San Francisco, Oakland, Vallejo, or Benicia, or of the towns of Brooklyn or Alameda, a board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia."

Section 2442, Political Code:

"The commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions."

Section 2443, Political Code:

"The commissioners must organize as boards respectively by the election of presidents, secretaries, and treasurers. They must provide for themselves offices, in which they must meet as follows: The 'San Francisco board' must meet once a month in the City of San Francisco * * *."

Section 2445, Political Code:

"The San Francisco board may appoint a secretary and fix his compensation, not to exceed the sum of two hundred and fifty dollars a month. * * *."

Section 2447, Political Code:

"Neither the commissioners nor their secretaries must have any interest in any pilot-boat or steam-tug, nor in the earnings thereof, other than for compensation as herein provided. Any one violating this section forfeits his office."

Section 2460, Political Code:

"Every pilot of the harbor of San Francisco, Mare Island, Vallejo, and Benicia, must once in each month, upon blanks to be furnished to them by the board of pilot commissioners, render a verified account to the board of all moneys received by him, or by any other person for him, or on his account, and pay five per cent. thereof to the board, in full compensation for its official services, for the services of its secretary and treasurer, and all incidental expenses. * * *."

Section 2462, Political Code:

"Any pilot may be deprived of his license before its expiration for the following causes only: * * *

2. For neglect, for thirty days after the same becomes due, to pay over to the board the five per cent. on the pilotage money received by him;"

Section 2466, Political Code:

"The following shall be the rates of pilotage into and out of the harbor of San Francisco: All vessels under five hundred (500) tons three ($3.00) dollars per foot draft; all vessels over five hundred (500) tons three ($3.00) dollars per foot draft and three (3c.) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot-boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trades shall be exempt from all pilotage except where a pilot is actually employed."

Section 2468, Political Code:

"All vessels sailing under an enrollment, and licensed and engaged in the coasting trade, between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code."

Section 379, Penal Code:

"Every person, not the master or owner, or not authorized to act as pilot under the laws of this state, who pilots or offers to pilot any vessel to or from any port of this state for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor."

8. It is stipulated that the S. S. "Queen," and the S. S. "Umatilla" were each, at the times referred to, duly registered American steam vessels and were sailing "under register" and were then (p. 25, No. 1850) either on a voyage *from the port of San Francisco* in the State of California *to a United States port on Puget Sound, or from a United States port on Puget Sound to said port of San Francisco*, but in either such case said vessel did, while *en route* between such ports in the United States, *stop at the port of Victoria, B. C.*, to and from which said port of Victoria she did then carry and did then and there deliver and receive, both passengers, mail and freight. It is further stipulated (subd. 9, p. 28, No. 1850, and p. 16) that "the stop and stay of said "steamship at said Victoria, for such purpose (dis-"charging and receiving passengers, mail, and freight) "being for about one hour only; and said steamship, "by the clearance thereof granted at said Port Town-"send was authorized to so stop *en route* at said Vic-"toria." (See, also, p. 21, No. 1851, for like stipulations regarding S. S. "Queen.")

9. That (No. 1850, p. 24) at the several times in his said libel mentioned the said N. Jordan tendered to the

master of said S. S. "Umatilla" his, said Jordan's services as a pilot so licensed to pilot said "Umatilla" on her then voyage *out of* said port of San Francisco by going on board said vessel alongside the wharf to which said steamship was then made fast and not more than one hour before she was to and did sail on her voyage therefrom, and then and there orally stating to said master that he, said Jordan, was then and there ready and able and willing to so pilot said vessel and that he, said Jordan, then desired that he be so employed.

10. That (No. 1850, p. 26) each of the masters and first officers of each of said vessels, at all of the times in said several libels and schedules referred to, was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel when entering, and when departing from, said port of San Francisco, and all of the engineers and other officers of each of said vessels who under the laws of the United States need then be licensed were then duly licensed officers thereof and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely and without the assistance of any pilot licensed under authority of the State of California, navigated and piloted vessels under his command then sailing under "register" and of the class of those in said libels and said schedules referred to out of, and into, said port of San Francisco.

11. That (No. 1850, p. 26) no master of any vessel owned or employed by either of said claimants and sailing under "register" had ever, during the twenty (20)

and more years next prior to any of the times in said libels referred to, accepted the services of any of said libelants, nor of any state licensed pilot, to pilot any such vessel out of or into said port of San Francisco; and during all of the times herein last referred to each of said libelants and all state licensed pilots well knew that their services, as pilots licensed by the State of California, to so pilot any such vessel would not if tendered be availed of or accepted by either or any of the masters of such vessel nor by either or any of said claimants.

12. That (No. 1850, p. 27) each and every and all of the said vessels in said several libels or in any schedule hereto attached referred to was, long prior to any of the times in said several libels or said schedules referred to, well known to each and every and all of said libelants and to all state licensed pilots for the said port of San Francisco (that said several vessels sailed from and arrived at San Francisco on a regular schedule, and could be and were, by each and all of said libelants and all state licensed pilots, identified and known, when approaching the port of San Francisco, long before he or any pilot need or in the ordinary course of his business would make any effort to "speak" the same if such vessel were by him thought to be in need of a pilot).

13. That (No. 1850, pp. 27-8) when the present state pilotage regulations for the port of San Francisco were under consideration by the legislature of the State of California, the state licensed pilots for said port appeared before each of the committees of said legislature having such matters in charge and then, by themselves and by their representatives, were heard in connection

with such regulations; and were likewise so heard by the Governor of said state before the Act of the legislature fixing such regulations, as now embodied in certain sections of the Political Code, was approved by him; and the fact long before then had been and then was, and since then has been and still is, that the only steam vessels that had been or were engaged in the coasting trade touching *en route* at a foreign port and sailing under "register" out of or into the said port of San Francisco were such of the vessels of said claimants, to wit, Pacific Coast Steamship Company, or The Pacific Coast Company, as had been and were so employed.

14. It is further stipulated (No. 1850, p. 28) that when the S. S. "Umatilla" sailed from San Francisco she had on board (p. 23, No. 1851) 149 passengers and 1515.4 tons of freight destined to United States ports on Puget Sound, and 31 passengers and 94.4 tons of freight destined to Victoria, B. C.; and that (p. 17, No. 1850) the S. S. "Queen" had on board 279 passengers and 1238.2 tons of freight destined to San Francisco, and that she received at Victoria, destined to San Francisco, 51 passengers and 18.3 tons of freight.

15. The statute of the State of California regarding liens on vessels is Section 813, Code of Civil Procedure, which reads as follows:

> "All steamers, vessels and boats are liable:
>
> "1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.
>
> "2. For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees.

"3. For work done or materials furnished in this state for their construction, repair, or equipment.

"4. For their wharfage and anchorage within this state.

"5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within this state, made by their respective owners, masters, agents, or consignees.

"6. For injuries committed by them to persons or property, in this state.

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued."

On the foregoing facts the following material questions arise:

(a) May a proceeding *in rem* be maintained to recover the pilotage fee provided by Sections 2466 and 2468, Political Code, when, as here, it is stipulated (p. 31, No. 1850) that "*no pilotage service*, herein re-"ferred to as having been tendered, was accepted": and this especially in view of the further stipulation (subds. 11 and 12 hereof) that all of said pilots had for more than 20 years known that their services, if tendered, would not be accepted by either of said vessels, and, further, could identify the several vessels as those of your petitioners—as vessels that would not accept of their services—"long before he or any pilot need or in "the ordinary course of his business would make any "effort to speak the same if such vessel were by him

"thought to be in need of a pilot." In other words, what the pilots did, when speaking the vessel, was not to make a *bona fide* tender of services which they thought might be needed, but, on the contrary, was only an effort to fix their right to a statutory fee.

In this connection we submit that a maritime lien, a lien that may be foreclosed by a proceeding *in rem* in an admiralty Court, cannot arise from, or result from, a mere tender of services to a vessel: On the contrary, a maritime lien for services arises only from services rendered to or on board of a vessel. Section 813, Code of Civil Procedure, above quoted, provides that a lien for services arises only from services rendered on board the vessel.

In *Steamship Company* v. *Port Warden*, 6 Wall., 31; 18 L. Ed., 749, 750, the Court said:

> "Pilotage is compensation for services performed";

and this Court's Admiralty Rule 14, which authorizes a proceeding *in rem* for "pilotage," therefore means that a suit *in rem* for "pilotage" may be maintained when a pilotage service has in fact been performed.

(b) A further question presented by the record is, Whether, in view of the fact that these proceedings are, in the strictest sense, demands for a statutory fee it be necessary that those things which the statute prescribes, as a means of fixing a pilot's right to the fee, shall in fact be done?

The language of the statute is (Sec. 2466, Pol. Code):

> "Every vessel spoken * * * shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night display-

ing a torch or flare up, within a distance of three (3) miles of the vessel."

It is stipulated that the "Queen", inward bound, was spoken in the manner by the statute provided.

It is also stipulated that the "Umatilla", outward bound, was not so spoken: On the contrary (subd. 9 hereof) the pilot on the vessel as she lay tied to the wharf, and within an hour before she sailed, made a tender of his services to the master of the "Umatilla". That, we respectfully submit, did not meet the requirements of the statute regarding "speaking" the vessel, and therefore did not fix the pilot's right to the statutory fee; a fee a right to which the statute specifically provides shall be fixed by a display from a pilot boat of a union jack by day, or a flare up light by night, within three miles of the vessel.

(c) A further question presented by the records is, May the State of California lawfully levy a tonnage tax on American steam vessels engaged in interstate commerce and sailing under register, for the benefit of the State?

The pilotage fee provided by Section 2466, Political Code, for these vessels is three (3) cents per ton registered measurement and three (3) dollars per foot draft; five (5) per cent. of which tonnage fee, and draft measurement fee, is, in advance of its collection, to wit: was, when the pilotage statute was enacted, by Section 2460, Political Code, appropriated to the use of the State, in payment for the services of its officers.

Petitioners contend that the State is inhibited from levying such tonnage tax for its use by Subdivision 3 of Section 10 of Art. 1 of the Constitution of the United

States; and that the provisions of Section 2460, Political Code, appropriating five (5) per cent. of the tonnage tax to the use of the State makes void all of the provisions of Section 2466, Political Code, fixing the so-called pilotage fees.

(*d*) A further question arising from the records is: Does the language of Section 4444, Revised Statutes, to wit:

> "Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any state, *requiring vessels* entering or leaving a port in any such state, other than coastwise steam vessels, *to take a pilot* duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state";

authorize the State of California to levy a tonnage tax or a pilotage fee on a coastwise vessel sailing under register entering or leaving the port of San Francisco; *the State statute not making it obligatory on any vessel*, or the master thereof, *to take a pilot* when entering or leaving the port of San Francisco.

Your petitioners contend that the State of California may not so do. That the power reserved to the State was to enable it to safeguard passengers and freight when entering or leaving its ports; this by requiring that vessels when so doing *should take a pilot* because, in the judgment of the State, the vessel's navigation was so dangerous as to make the services of a State licensed pilot necessary for her safety—but that no power was so reserved to the State to simply levy a so-called pilotage fee, leaving it, as the California statute does, entirely to the option of the master, or owner, whether his vessel shall, or shall not, be piloted by a state licensed pilot.

(e) A further question arising from the records is, whether, in view of the provisions of Sections 3126, 4361, 4401, 4438, 4442, 4443, 4444, and other sections of the Revised Statutes and Rule 43 of the Board of Supervising Inspectors—under authority given it by Section 4405, Revised Statutes—approved by the Secretary of Commerce and Labor (Edition of March 14, 1906, p. 94) which rule reads:

> "43. *The navigation of every steamer* above 100 gross tons *shall be under the control of a first-class pilot*, and every such pilot shall be limited in his license to the particular service for which he is adapted. Special pilots may also be licensed for steamers of 10 gross tons and under, locally employed",

and the stipulated fact (par. 5, p. 26, No. 1850),

> "5. That each of the masters and first officers of each of said vessels, at all of the times in said several libels and schedules referred to, was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel when entering, and when departing from, said port of San Francisco, and all of the engineers and other officers of each of said vessels who under the laws of the United States need then be licensed were then duly licensed officers thereof and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely and without the assistance of any pilot licensed under authority of the State of California navigated and piloted vessels under his command then sailing under 'register' and of the class of those in said libels and said schedules referred to out of, and into, said port of San Francisco";

the S. S. "Queen," and the S. S. "Umatilla" were each, when enterng or leaving the port of San Francisco, navigated as required by Title LII of the Revised Statutes; and therefore, under the express provisions of Section 4444, Revised Statutes, to wit, "nor shall any "pilotage charge be levied by any such (State) au- "thority upon any steamer piloted as provided by this "Title," the State of California may, by its statutes referred to, subject either of said steam vessels to the payment of any pilotage charge whatever.

Petitioners contend that each of the vessels referred to was, at the times referred to, navigated as provided by Title LII of the Revised Statutes, and that the State of California may not subject either of said vessels, or their owners, to the payment of any pilotage fee whatever.

(f) A further question arising from the records is, Whether, in view of the stipulated facts, the vessels referred to were "coastwise steam vessels" within the intent of Section 4444, Revised Statutes, and, as such, exempt from the pilotage regulations of the State of California?

Petitioners have at all times contended that the vessels referred to were at the times referred to coastwise steam vessels and, as such, were not subject to any pilotage regulations of, or the payment of any pilotage fee provided by, the State of California.

The District Court for the Northern District of California (No. 1850, pp. 57-61, and No. 1851, pp. 47-8) held that the vessels were coastwise steam vessels and, on that ground only, entered its decree dismissing the several libels.

The Circuit Court of Appeals for the Ninth Circuit

(No. 1850, Supm't, pp. 6-20) also so held, and (No. 1850, Supm't, p. 34) affirmed the decrees of the District Court, Gilbert, *J.*, dissenting; but afterwards granted a rehearing and certified to this Court the questions stated in this Court's Nos. 641 and 642.

The foregoing contentions are not here for the first time made—on the contrary, by oral argument and by briefs filed, each of said contentions was pressed upon the attention of the said District Court, and the said Court of Appeals.

While the amounts involved in these two cases are small, it is still a fact (see stipulation No. 1850, pp. 32-52) that a large and constantly increasing amount is dependent upon the final decision of these cases.

It is a stipulated fact, that for twenty years last past no vessel of either of these petitioners and claimants has ever accepted the services of a state licensed pilot at the port of San Francisco. Their ships' masters are all licensed as pilots for the port of San Francisco under the authority of the United States; as are also (No. 1850, pp. 23-4) the State licensed pilots; and there is therefore no apparent need that one duly licensed pilot, for a given port, be there piloted by another pilot licensed for that port by the same authority even if he also be licensed under State authority. It is also a stipulated fact that the vessels referred to (No. 1850, p. 28) enter or depart from the port of San Francisco not less than four (4) times each month, and that the pilotage fee, for simply speaking the S. S. "Queen" is $110—and for simply speaking the S. S. "Umatilla" is $120.

It thus appears that the tax which the State of California has endeavored to impose upon these claimants, simply because the coastwise voyages of their said ves-

sels are made under "register," instead of under "license," is from $440 to $480 per month; and (No. 1850, p. 44) in the case of its steamers "President" and "Governor" is about $560 per month for each vessel when similarly employed.

The questions certified by the Court of Appeals (No. 1850, Supm't, pp. 37-45) touch only the questions stated in subdivisions (e) and (f) of this petition, that is, are questions which relate entirely to the ground upon which the District Court placed its decision, and the ground upon which that decision was, first, affirmed by the Court of Appeals. The questions not certified; that is, those stated in subdivisions (a), (b), (c) and (d) of this petition, we deem to be material and important and, in the event that the decision of this Court on the questions certified shall be adverse to appellees, and the decrees in their favor be finally reversed by the said Court of Appeals, your petitioners would then endeavor, by certiorari or otherwise, to secure the opinion of this Court on the questions above stated and not certified. If, on the other hand, the entire record be ordered certified to this Court all of the questions material to a final decision may be at the same time considered, and a decree be thereupon entered that shall be final.

In the certificate neither the statutory provisions of the State of California which need be considered, nor the stipulated facts that need be considered when the Court is deciding the contentions stated in subdivisions (a), (b), (c) and (d) hereof are set forth; and we respectfully submit that in the absence of the entire records in the proceedings referred to the questions above stated, and not certified by the said Court of

Appeals, cannot be advisedly determined. If those questions be not material to a decision of the cases referred to, then it must follow that the said certificate of the Court of Appeals presents the entire case for this Court's decision; which, we submit, may not properly be so done.

And your petitioners pray that on a presentation and consideration of this petition a writ of certiorari be ordered issued from this Honorable Court addressed to the United States Circuit Court of Appeals for the Ninth Circuit and the clerk thereof commanding said Court and the clerk thereof to certify to the Supreme Court of the United States the entire record in the proceeding pending before it entitled *M. Anderson (Libelant), Appellant, v. The Pacific Coast Steamship Company, a corporation, Claimant of the Steamship "Queen", her engines, boilers, machinery, tackle, apparel and furniture (Respondent), Appellee, No. 1850*, on the records of said Court of Appeals, together with its opinion therein, and the entire record in the proceeding pending before it entitled *N. Jordan (Libelant), Appellant, v. The Pacific Coast Company, a corporation, Claimant of the Steamship "Umatilla", her engines, boilers, machinery, tackle, apparel and furniture (Respondent), Appellee, No. 1851*, on the records of the said Court of Appeals, together with its opinion therein for the review and determination of said causes by the Supreme Court of the United States, as provided in Section 6 of the Act of Congress approved March 3, 1891; and your petitioners further pray that pending a hearing had on said records so to be ordered certified that no hearing be had on the said questions heretofore

certified to this Honorable Court by said Court of Appeals; And your petitioners will ever pray.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Counsel for Petitioners and Appellees.

State of California,
City and County of San Francisco.—ss.

Geo. W. Towle being first duly sworn deposes and says: that he has at all times been proctor for petitioners in each of the proceedings in the foregoing petition referred to and as such is better informed regarding the records in said proceedings and the matters in the foregoing petition stated than is either of said petitioners; that he has read the foregoing petition and knows the contents thereof and that the allegations of said petition are to the best of his knowledge, information and belief each and all true.

GEO. W. TOWLE.

Subscribed and sworn to before me this 27 day of January, 1912.

[SEAL] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay and that in our opinion each of the proceedings referred to in said petition is a proper one for granting the relief prayed for.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Counsel for Petitioners and Appellees.

To M. Anderson, and N. Jordan, Respondents to the foregoing Petition, and Wm. Denman, Esq., Proctor for each of said Respondents:

You and each of you are hereby given notice that Pacific Coast Steamship Company, and The Pacific Coast Company, petitioners in the foregoing petition, will at the Court room of the Supreme Court of the United States, situate in the Capitol Building at the City of Washington, D. C., and on the opening of said Court on Monday, the 12th day of February, 1912, or so soon thereafter as proctors for said petitioners in such matter may be heard, present the foregoing petition to said Supreme Court and thereupon move the said Court for an order that the writ of certiorari in said petition prayed for be issued, and that the prayers of said petition be granted.

Dated this 26th day of January, 1912.

~~Simpson, Thacher & Bartlett,~~

Geo. W. Towle,

Proctors for Petitioners and Appellees.

No.

In the Supreme Court

OF THE

United States.

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen", her tackle, apparel, etc.,
Petitioner,

vs.

M. ANDERSON, Libelant of said S. S. "Queen," etc.,
Respondent.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla", her tackle, apparel, etc.,
Petitioner,

vs.

N. JORDAN, Libelant of said S. S. "Umatilla", etc.,
Respondent.

Brief on Behalf of Pacific Coast Steamship Company, and The Pacific Coast Company, Petitioners for a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

A simple offer to render services to, or on board of, a vessel does not give rise to a maritime lien: on the contrary a maritime lien arises, in the case of personal services, only from a contract, express or implied, for a maritime service.

In *Barton* v. *Brown*, 145 U. S., 345, 347; 36 L. Ed., 727, 731, the Court said that a lien for pilotage was given, if at all, by the local law.

The law of California gives a lien for personal services to vessels only when, Code of Civil Procedure, Section 813, services have been rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

That state statute gives a lien for "pilotage" as defined by this Court in *Steamship Company* v. *Port Wardens*, 6 Wall., 31; 18 L. Ed., 749, that is, when a pilot's services had been accepted by the master and the pilot has navigated the vessel—but it does not give a lien for pilotage upon a mere tender of a pilot's services, which services are declined.

In *People's Ferry Company* v. *Beers*, 20 How., 393; 15 L. Ed., 961, 964, the Court said:

> "The admiralty jurisdiction * * * is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation."

That is, an admiralty lien may only arise from one of those specified causes.

But here there was no contract, there was no service, there was no duty to accept the pilot's services; the pilot had no right to render the services if they were declined; all there is here is a *claim* for a statutory fee;

a fee to secure the payment of which there is no general maritime lien, and the state statute has given none.

We submit therefore that a proceeding *in rem* to recover such statutory fee may not be maintained.

II.

The tender of the pilot's services to the S. S. "Umatilla" was not so made as to fix his right to the statutory fee.

Section 2466, Political Code, imposes a liability for a pilotage fee only in the event that a vessel be spoken; and in the next sentence defines how a vessel may be so spoken by a pilot as to fix his right to a pilotage fee; and it is stipulated that the "Umatilla" was not spoken in the manner provided by the statute.

A proceeding to fix the right to, and to collect, the statutory fee here claimed is strictly *in invitum*, and therefore the libelant of the "Umatilla" must show a strict compliance with the statute; for, when a statute provides for a fee and states the mode, or manner, by which a right to such fee may be fixed, then the means so provided, and none other, must be used. In such case the mode is the measure of the power.

This is a familiar rule in all tax cases.

In *Moss* v. *Shear*, 25 Cal., 38, 48; the Court said:

> "In order to impart any validity to the Acts of the Assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by that officer."
>
> *Smith* v. *Davis*, 30 Cal., 537;
>
> *Taylor* v. *Donner*, 31 Cal., 480, 482.

In *Huntington* v. *C. P. R. Co.*, 2 Sawy., 503, 12 Fed. Cas., 974, 977, the Court said:

> "It has often been held by the Supreme Court of California, and the courts of other states, that taxes and street assessments not assessed in strict accord with the provisions of the statute are void."

As libelant's right here asserted against S. S. "Umatilla" is based upon a California statute, the law of that state should govern.

Martin v. *West*, 4 Advance Sheets, 42—decided Dec. 4, 1911.

III.

The State of California may not, in the guise of a pilotage fee or otherwise, impose a tonnage tax on American registered steam vessels, engaged in interstate commerce, for the use of the state.

The State of California by Sections 2440, 2442, 2443 and 2445, Political Code, creates a number of state officers with fixed terms; fixes their duties and provides for their appointment of a secretary at a salary of $250 per month; and then to enable it to defray the expense thereby incurred levies a tonnage tax of three (3) cents per ton registered measurement on all vessels entering or leaving the port of San Francisco and sailing under "register."

That the whole of the tax so levied is not for the use of the state is, we submit, immaterial. It is sufficient, to render the tax invalid, that it be a tonnage tax and any part of it appropriated to the state's use; and, as

said in *Inman S. S. Co.* v. *Tinker*, 94 U. S., 238; 24 L. Ed., 118:

> "It does not advance the argument in behalf of the appellee (the claimant of the tax) to maintain that the regulations prescribed by the act are necessary and proper in the port for which they are provided."
>
> *Peete* v. *Morgan*, 19 Wall., 581; 22 L. Ed., 201;
>
> *Steamship Company* v. *Port Wardens*, 6 Wall., 34; 18 L. Ed., 750;
>
> *Cannon* v. *New Orleans*, 20 Wall., 577; 22 L. Ed., 417;
>
> *Cox* v. *Lott*, 12 Wall., 204; 20 L. Ed., 373-4;
>
> *Booth* v. *Lloyd*, 33 Fed., 593, 598.

Section 4220, Revised Statutes, reads:

> "No *vessel* belonging to any citizen of the United States, *trading from one port within the United States to another port within the United States*, or employed in the bank, whale, or other fisheries, *shall be subject to tonnage tax or duty*, if such vessel be licensed, *registered* or enrolled."

So far as can be judged by California statute it is not, in the opinion of that state, essential to the safety of vessels entering or leaving the port of San Francisco, that they shall be navigated by a state licensed pilot—this because the state statute does not require that any such vessel shall take any such pilot. All that the state statute does is to fix a pilotage fee—the same in amount whether a pilot's services be accepted or declined—and then leave it entirely to the option of the master or owner of a vessel whether a state licensed pilot shall be employed.

While the statute designates its tax on vessels as

"pilotage fee", we submit that it is a tax levied on vessels simply because they enter and leave the port of San Francisco; certain of such vessels being declared subject to the tax, and the levy of the tax being dependent only on a "union jack", or a "flare up" being displayed by a pilot boat within three miles of the vessel. Such display and the record thereof made is but the counterpart of the listing of property declared subject to taxation by a county assessor.

Adams Express Company v. *Ohio, etc.*, 166 U. S., 185, 218; 41 L. Ed., 965, 976.

The statute considered in *Cooley* v. *Board of Wardens*, 12 How., 299; 13 L. Ed., 996, provided that every designated vessel *shall be obliged to receive a pilot*, failing which a stipulated forfeiture was imposed. That statute was within the power, and we think the only power, reserved to the states by the last clause of Section 4444, Revised Statutes.

A similar statute was considered in *The William Law*, 14 Fed., 792, 797.

The Carrie L. Tyler, 106 Fed. (C. C. A.), 422, 425;

Smith v. *The Creole*, Fed. Cas. No. 13,033.

We respectfully submit that the prayer of our petition should be granted.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Of Counsel.

No.

In the Supreme Court
OF THE
United States

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen", her tackle, apparel, etc.,
Petitioner,
vs.
M. ANDERSON, Libelant of said S. S. "Queen", etc.,
Respondent.
} No. 641.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla", her tackle, apparel, etc.,
Petitioner,
vs.
N. JORDAN, Libelant of said S. S. "Umatilla", etc.,
Respondent.
} No. 642.

BRIEF IN OPPOSITION TO PETITION TO CERTIFY WHOLE RECORD.

WM. DENMAN,
Attorney for Respondents M. Anderson and N. Jordan.

Filed this ..... *day of February, 1912.*

JAMES H. McKENNEY, Clerk.

By ..... *Deputy Clerk.*

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vs.

N. JORDAN, Libelant of said S. S. "Umatilla", etc.,

Respondent.

BRIEF IN OPPOSITION TO PETITION TO CERTIFY WHOLE RECORD.

The Circuit Court of Appeals has already certified here four questions from the cases in the caption hereof, for the opinion of this Court. They are four

closely related questions as to the control of the pilotage of *registered* steam vessels entering and leaving American ports, having resident bar pilots who are State officers. The reason for the certification and the advance on the calendar of this Court was undoubtedly because these "registered" American steamers are engaged mainly in long voyages between the Atlantic and Pacific ports of the United States (where the commerce is coastwise) or between American and foreign ports; and also because they will carry the large traffic expected to pass through the Panama Canal in so far as it is between Atlantic and Pacific ports of the United States. The danger to vessels coming from these long voyages into ports as difficult of access as those on Chesapeake and Delaware Bays or of the Schuylkill River, or reached only across the San Francisco and Columbia River bars, piloted by the ships' officers having Federal licenses, and who are necessarily after this long absence unfamiliar with port and bar conditions, presented a proper case for the attention of this Court, where, as here, the lower judges were disagreed as to whether the State or Federal pilots should take control.

Now the appellees below are seeking to bring up the whole record in both cases and add new questions of law and fact of widely diversified nature, *but none of them of novel import.* It takes twenty pages of their petition just to state their case, made up mostly from facts from the records below. For while it is true that there was an agreed statement of facts covering some thirty-three pages (half of it irrelevant)

of the record in *Anderson v. "Queen"*, it is not correct to say that there is no dispute as to the *inferences of fact to be drawn from this statement.* There is a serious dispute which is not presented to this Court by the certified questions, but which will have to be determined if the case is to be tried on the entire record.

We say that these new questions so attempted to be introduced are not of novel import. It is not even claimed by our opponent that they are, or that there is a conflict in the lower courts. We will consider each.

a (p. 13 of petition). Has California created a right *against the vessel* for the service of maintaining a pilotage organization consisting of pilots who alternately cruise on the Golden Gate bar, supervised and regulated by a commission, where such service is always available to the vessel when crossing the bar, if the vessel does not accept the service and has not done so for many years prior? Note—not has the State the *power*, but has it *exercised* the power in enacting the particular statutes cited, which, by the way, expressly state that "every "*vessel spoken* * * * shall pay said rates" (petition, page 8), and that "*all vessels*, their tackle, ap- "parel and furniture *are* * * * *severally* liable for "pilotage fees" (petition, page 6). Surely it is not for the mere construing of State statutes of this character that certiorari is granted, even if the question were a doubtful one, as it clearly is not on the face of the petition.

Incidentally it may be remarked that the brief for the guidance of the Court does not even mention these

two statutes but bases its entire argument on another provision of the Codes not concerned with pilotage. It does not mention any case holding such a lien invalid but fails to mention any of the following cases holding it valid:

The Edith Godden, 25 Fed. 511;
The William Law, 14 Fed. 792;
The Glenearne, 7 Fed. 604;
The Algena, 14 Fed. 174;
The Francisco, 14 Fed. 495;
The Alameda, 32 Fed. 331.

b (page 14). Was the outbound vessel properly spoken within the meaning of the statute? This is a matter, first, of inference of fact from the agreed statement; and second, of interpretation of the State regulation. Hardly a question for certification.

c (page 15). Is the pilotage fee a "tonnage tax" on interstate commerce because it is measured by the tonnage of the vessel piloted? This matter was disposed of in the following cases:

Huse v. Glover, 119 U. S. 543;
Harmon v. Chicago, 147 U. S. 396;
Packet Co. v. Keokuk, 95 U. S. 80;
Transportation Co. v. Parkersburg, 107 U. S. 691;
People v. Roberts, 92 Cal. 659.

Is the pilotage fee which is paid to the pilots and the commissioners (who regulate the service, keep track of the river freshets which affect the currents on the bar, etc.) a tonnage tax because both the pilots (14 Cal. 43) and the commissioners are State officers? In other

words, granted that the service is a pilotage service, does it make a fee any more a tonnage tax because it is paid to State officers who perform the service? The question was squarely answered, in the negative, by this Court in the case of *Cooley v. The Port Wardens*, where the fee did not go to the pilots rendering the service at all, but was given to aged pilots, their widows and children.

12 Howard, 313-315.

d (page 16). Is the pilotage fee any more a tonnage tax because, although the organization is constantly maintained and ready at the bar for the incoming vessel, the vessel is liable for the fee even when she does not accept the service? The petition seeks to make a distinction between the coercive effect of a statute which orders a vessel to take a pilot and requires her to pay a fee if she does not, and a statute which says "if you don't take a pilot you will have to pay a fee". For all practical purposes the statutes are identical in their effect on the shipowner although the words of command are omitted from the second. Yet on this trivial distinction the petitioner urges that the fee in the first case (*Cooley v. Port Wardens*, 12 How. 313) is not a tonnage tax, while in the second it is.

e (page 17). This is but a variation of one of the four certified questions, which will be answered in answering them.

f (pages 18 et seq.). Here we have what we are confident contains the real motive for the attempt to obtain certiorari. They desire to make a showing of hardship,

which the cold questions of law asked by the Circuit Court of Appeals do not present. They point out that it costs this vessel $110.00 for maintaining the service which they refuse, and that vessel $120.00, etc., and they seem to urge that the State has abused its powers and made the fee too large.

We take it that the *power* of the States of New York or Louisiana or Oregon to regulate their resident bar pilotage is not to be affected by the *size* of the fee at the port of San Francisco. This Court, we submit, is not concerned with the alleged abuse of a State power, once it is granted to exist. That is a political question and for other tribunals.

We therefore submit that no ground has been shown to exist for the granting of certiorari in this case and that it should be denied.

WM. DENMAN,

Attorney for Respondents M. Anderson and N. Jordan.

ANDERSON *v.* PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "QUEEN."

JORDAN *v.* PACIFIC COAST COMPANY, CLAIMANT OF THE STEAMSHIP "UMATILLA," ETC.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 641, 642. Argued February 21, 1912.—Decided May 27, 1912.

When the Federal Constitution was adopted each State had its own pilotage regulations.

State pilotage laws are regulations of commerce, but they fall within that class of powers which may be exercised by the States until Congress shall see fit to act.

The provisions of former Federal statutes relating to pilotage were incorporated in §§ 4401 and 4444, Rev. Stat., which are still in force.

In adopting the Revised Statutes change of arrangement from earlier

statutes will not be regarded as altering their scope and purpose; an intent of Congress to change the effect of prior law will not be presumed unless clearly expressed.

Distinctions between registered and enrolled vessels and history of statutes relating to state pilotage of registered and coastwise vessels reviewed and *held* that:

Coastwise sea-going vessels sailing under register and having officers with Federal pilot's licenses are not free from liability for pilotage fees under state laws, by virtue of § 51 of the act of February 28, 1871, 16 Stat. 440, c. 100, as reënacted in §§ 4401 and 4444, Rev. Stat.

There are no provisions in Title 52 of the Revised Statutes which may be construed as exempting coastwise sea-going vessels sailing under register, whose officers have Federal pilot's licenses, from liability for pilotage fees under state laws, under the rule of construction laid down in the last sentence of § 51 of the act of February 28, 1871.

Congress did not intend to classify with the coastwise vessels referred to in the last proviso of § 51 of the act of February 28, 1781, as reënacted in § 4444, Rev. Stat., registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage.

The wisdom of establishing Federal rules as to port pilotage for such registered vessels now exempted is a question for Congress to determine.

In this case *held* that American registered steam vessels sailing from San Francisco clearing for final destination to American ports and return, but stopping at foreign ports en route for less than ten per cent of the traffic, are subject on entering and leaving the port of San Francisco to the state pilotage laws of California as contained in §§ 2468, 2466 and 2432 of the Political Code of that State.

THE certificate in these cases is as follows:

"The libels in the above cases involve the question of power of a State to make pilotage regulations for certain classes of registered sea going steam vessels when entering and leaving harbors within the confines of the State.

"The steamers 'Queen' and 'Umatilla' were regularly sailing under register and were either on a voyage from the port of San Francisco in the State of California to a United States port on Puget Sound or from a United

States port on Puget Sound to said port of San Francisco, but in either such case said vessels did while en route between said ports of the United States stop at the port of Victoria, B. C., to and from which port of Victoria she did then carry and did then and there deliver and receive both passengers, mail and freight. Both vessels sailed direct to Victoria from San Francisco and direct to San Francisco from Victoria. At least ninety (90) per cent of passengers and cargo was carried between the United States ports and the parties stipulated that the voyage for which the vessels cleared was beween Puget Sound ports of the United States and San Francisco, with the right to stop and trade en route at Victoria. The stop at Victoria on each occasion was for about an hour. The officers of each vessel had federal pilot's licenses and each vessel was in fact piloted in entering and leaving the port of San Francisco by such an officer. Each of the vessels was tendered pilotage services—the 'Umatilla' on leaving port and the 'Queen' on entering—by a resident bar pilot of the port of San Francisco, duly commissioned, and acting under the law of the State of California. In each case the tender was declined. The ships refused to pay the pilotage fees imposed by the following sections of the Political Code of the State of California:

" '2468. Pilotage and half pilotage. All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code.

" '2466. Rates of pilotage at San Francisco. The following shall be the rates of pilotage into and out of the

harbor of San Francisco: All vessels under five hundred (500) tons three ($3.00) dollars per foot draught; all vessels over five hundred (500) tons three ($3.00) dollars per foot draught and three (3c.) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage except where a pilot is actually employed.

" '2432. Vessel, owner, etc., liable for pilotage. All vessels, their tackle, apparel and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction.'

"On February 28, 1871, Congress enacted an act 'for the better protection of persons on vessels propelled in whole or in part by steam, etc.,' section 51 of which is pertinent to these cases. This section was in 1873 reenacted in sections 4401 and 4444 of the revised statutes. The portions of the section and its subsequent codification on which the court's questions are based are printed in parallel columns as follows:

" 'An act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam.'	"Revised Statutes Title LII. 'Regulation of Steam Vessels.'
"'SECTION 51. And be it further enacted that . . .	"R. S. 4401. '. . . and every coastwise sea going

every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. . . . Nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as herein provided . . . Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.'

"(The above in a single paragraph.)

steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.'

"R. S. 4444. '. . . nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as provided by this title . . . Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State.'

"The pilots, appellants here, libelled the vessels in the United States District Court for the Northern District of California. The two cases were consolidated for trial in

the District Court. It was contended that there was a conflict between the Federal and the state law as to the control of the vessels for purposes of bar pilotage. The libelants relied upon the state law giving the resident state bar pilotage control of the vessels in question when entering or leaving port. The District Court held that the Federal law excluded these vessels from state control and the libels were dismissed.

"On appeal to this court it has become apparent that the decision of the two cases involves a question of conflict of jurisdiction between the State and the Federal Government as to the pilotage of all steam vessels touching at both foreign and domestic ports on the one voyage and also as to the pilotage of the large number of registered steam vessels now engaged in traffic between ports of the Atlantic and the Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec and the Isthmus of Panama and around South America. The decision will also affect the very large number of steam vessels which may reasonably be expected to sail between American ports on the Atlantic and the Pacific Oceans, via the Panama Canal.

"In determining the intent of Congress in passing the Act of February 28, 1871, the court had under consideration the following statutes: the Act of August 7, 1789, codified in section 4235 of the Revised Statutes, recognizing and adopting the pilotage regulations of the various States so far as bar and entrance pilotage is concerned; section nine, paragraph nine and ten of the Steamship Act of August 30, 1852, creating a certain class of Federal pilots, (10 Statutes at Large, 67, reënacted in chapter 100, sections 18 and 14 of Act of February 28, 1871, (codified in Revised Statutes 4442 and 4438); Act of May 27, 1848, (codified in Revised Statutes 3126), permitting registered vessels sailing between ports of the United States to trade with foreign ports; section twenty of the Act of Febru-

ary 18, 1793 (1 Stats. 313, codified in Revised Statutes, 4361), providing for the regulation and duties of officers on registered vessels as to the carriage of foreign goods and distilled liquors and the making of manifests.

"The members of the court are unable to agree as to the interpretation of the cited portions of section 51 of the Act of February 28, 1871, codified in Revised Statutes, sections 4401 and 4444, and for this reason, and because of the importance of the interests affected, both governmental and commercial, the Circuit Court of Appeals for the Ninth Circuit certify the following questions to the United States Supreme Court, and request its instructions upon them.

"1. Are coastwise sea going steam vessels, sailing under register, and having officers with federal pilot's licenses, free from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of section 51 of the Act of February 28, 1871, entitled 'An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' as reënacted of date December 1, 1873, in sections 4401 and 4444 of the Revised Statutes?

"2. Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise sea going steam vessels sailing under register, whose officers have federal pilot's licenses from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, under the rule of construction laid down in the last sentence of section 51 of the Act of February 28, 1871, entitled 'An Act to Provide

for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam,' and as reënacted in section 4444 of the Revised Statutes?

"3. Did Congress intend to classify with the 'coastwise vessels' referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled 'An Act for the Better Security of Life on Vessels Propelled in Whole or in Part by Steam,' and reënacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage?

"4. Did Congress, in enacting the last proviso of section 51 of the Act of February 28, 1871, reënacted in section 4444 of the Revised Statutes, intend to exempt registered steam vessels whose officers have federal pilot's licenses, from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon proper tender of services of resident bar pilots of the State pilotage establishment, on entering or leaving the port of San Francisco on regular voyages, on which they steamed to Victoria, British Columbia, and carried cargo, mail and passengers direct thereto and direct therefrom; when, after leaving Victoria, British Columbia, on the outward voyage, they steamed to Puget Sound ports of the State of Washington, for which they had originally cleared, and returned therefrom to Victoria, British Columbia; when the stop at Victoria, British Columbia, is for about an hour on each occasion; when at least ninety (90) per cent of the passenger and cargo traffic for the outward and inward voyages is between the port of San Francisco and the ports of Washington; and when the traffic with the foreign port may be deemed en route between the domestic ports?"

Mr. William Denman for Anderson and Jordan.

Mr. Graham Sumner, with whom *Mr. George W. Towle*,

Mr. Thomas Thacher, Mr. Thomas D. Thacher and *Mr. Leland B. Duer* were on the brief, for Steamship Companies.

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court.

When the Constitution of the United States was adopted, each State had its own regulations of pilotage. While this subject was embraced within the grant of the power "to regulate commerce with foreign nations, and among the several States" (Art. I, § 8), Congress did not supersede the state legislation, but by the act of August 7, 1789, c. 9, § 4 (1 Stat. 53, 54; R. S., § 4235), it was enacted that "all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." This was "a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exercise its power, it should be left to the legislation of the States;" and it has long been established by the decisions of this court that, although state laws concerning pilotage are regulations of commerce, they fall within that class of powers which may be exercised by the States until Congress shall see fit to act. *Cooley* v. *Board of Wardens*, 12 How. 299, 319, 321; *Steamship Company* v. *Joliffe*, 2 Wall. 450, 459; *Ex parte McNiel*, 13 Wall. 236, 240; *Wilson* v. *McNamee*, 102 U. S. 572; *Olsen* v. *Smith*, 195 U. S. 332, 341. In 1837 (5 Stat. 153), it was provided that a master of a vessel entering or leaving a port situate upon waters which are the boundary between two States, might employ a pilot licensed by either State. There was no other Federal legislation upon the subject of pilots until 1852;

and thus "for more than sixty years" it was "acted on by the States, and the systems of some of them created and of others essentially modified during that period." *Cooley* v. *Board of Wardens, supra*, p. 321.

The act of August 30, 1852, c. 106 (10 Stat. 61), contained provisions for the licensing of pilots of steam vessels (§ 9, *Ninth, id.* 67). In *Steamship Company* v. *Joliffe, supra*, it was contended that the statute of the State of California of May 20, 1861, providing for port pilots at San Francisco, was in conflict with this act; but the court took the contrary view, holding that the Federal law did not relate to port pilots. The court said (pp. 460, 461): "The act of 1852 was intended, as its title indicates, to provide greater security than then existed for the lives of passengers on board of vessels propelled in whole or part by steam. . . . The act contains few provisions relating to pilots; indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were the subjects of just praise for their skill, energy, and, efficiency. The clauses respecting pilots in the act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors."

In 1866, Congress passed a more comprehensive statute embracing port pilotage (act of July 25, 1866, c. 234, 14 Stat. 227). After defining the vessels subject to the navigation laws of the United States, it enacted (§ 9) that "every sea-going steam vessel," so subject, should "when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted." In the following

year, however, this section was amended by the addition of a proviso that the act should not be construed to "annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State" to take a state pilot (act of February 25, 1867, c. 83, 14 Stat. 411). The existing state laws respecting port pilotage again became operative. *Sturgis* v. *Spofford*, 45 N. Y. 446, 451; *Henderson* v. *Spofford*, 59 N. Y. 131, 133.

The acts of 1852 and 1866 were repealed by the act of February 28, 1871, c. 100 (16 Stat. 440), the provisions of which were reënacted in Title 52 of the Revised Statutes. This act prescribed general regulations with respect to the licensing of pilots of steam vessels (§§ 14, 18; R. S. 4438, 4442) similar to those of the act of 1852. The requirement as to the port pilotage of coastwise sea-going steam vessels were set forth in § 51, to which reference is made in the questions propounded in the certificate. This section was as follows:

"SEC. 51. *And be it further enacted*, That all coastwise sea-going vessels, and vessel [s] navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this act; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. And no State or municipal government shall impose upon pilots of steam-vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other

regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, and in no case shall the fees charges for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed: *Provided, however*, That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

These provisions were incorporated in §§ 4401 and 4444 of the Revised Statutes, which are still in force.[1] The

[1] SEC. 4401. All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this Title; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.

SEC. 4444. No State or municipal government shall impose upon pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this Title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided by this Title; and in no case shall the fees charged for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State.

change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. *United States* v. *Ryder*, 110 U. S. 729, 740; *United States* v. *LeBris*, 121 U. S. 278, 280; *Logan* v. *United States*, 144 U. S. 263, 302; *United States* v. *Mason*, 218 U. S. 517, 525.

It will be observed that the requirement of § 51 of the act of 1871 (R. S. § 4401), as to the piloting of coastwise sea-going steam vessels, is limited and explicit. It is that "every coastwise sea-going steam-vessel subject to the navigation laws of the United States and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats." This covers port pilotage, for it relates to such vessels "when under way, except on the high seas;" and it applies only to those "*not sailing under register.*"

American vessels are of two classes, those registered, and those enrolled and licensed. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class and enrolment, in reference to the other." *The Mohawk*, 3 Wall. 566, 571. See *Huus* v. *New York & Porto Rico Steamship Co.*, 182 U. S. 392, 395. The act of December 31, 1792 (1 Stat. 287, c. 1), applicable exclusively to vessels engaged in foreign commerce and to their

registry, and the act of February 18, 1793 (1 Stat. 305, c. 8), relating to vessels engaged in the coasting trade and fisheries, and to their enrollment, constituted the basis for the regulations of the two classes. The latter act contained a provision (§ 20, *id.* 313; R. S. § 4361) that any registered vessel when employed in going from one district in the United States to any other district should "be subject (except as to the payment of fees) to the same regulations, provisions, penalties, and forfeitures" as those prescribed in the case of vessels licensed for carrying on the coasting trade. This, however, had no reference to pilotage, for Congress had not made regulations upon that subject. In 1848 (act of May 27, 1848, 9 Stat. 232, c. 48; R. S. § 3126) it was provided that any vessel, "on being duly registered," might engage in trade between ports of the United States "with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters, and mails."

Thus, at the time of the passage of the act of 1871, there were coastwise sea-going steam vessels sailing under register and having this privilege of touching at foreign ports, and also coastwise sea-going steam vessels, which were enrolled and licensed, not sailing under register. It was with respect to the vessels of the latter sort that Congress imposed the requirement of § 51 to use Federal pilots. The reason for the distinction may be found in the fact that the registered vessels, under the conditions of trade then existing, would presumably be engaged in the longer voyages, touching at foreign ports where Federal pilots would not avail and at domestic ports for all of which the ship's pilot might not hold a Federal license; and, as Congress did not create local Federal establishments for port pilotage, it was evidently deemed unwise to compel registered vessels in entering and leaving ports to be under the control of Federal pilots. Certainly the distinction was made; and

the necessary effect of the limitation of the requirement was to exempt the coastwise sea-going steam vessels, which did sail under register, from its terms.

As these registered vessels were free from this Federal regulation, they would be under no compulsion whatever as to port pilotage save by virtue of the operation of state laws. And it is an inevitable conclusion, on considering the prior history of pilotage regulations in this country and the policy which has been maintained with respect to the exercise of state authority, that, as Congress did not see fit to require Federal pilots, it left the regulation of port pilotage as to such vessels to the States.

It is contended, however, that although the employment of Federal pilots was not made compulsory for coastwise sea-going steam vessels sailing under register in entering and leaving ports, still they had an option to use such pilots, and, if in fact such a vessel was piloted by a Federal pilot, she could not be required to take a state pilot. The argument is based on the following provisions of § 51 (now found in R. S. § 4444):

"And no State or municipal government shall impose upon pilots of steam-vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, . . ."

This language gives no support to the contention. Wherever the regulations of the statute applied, they were absolute. The "pilots of steam-vessels herein provided for" were those whom, under the provisions of the statute, the vessels described were bound to use. It was upon the pilots, whose use was made compulsory by the Federal law, that "no State or municipal government" was to impose any obligation to procure a state or other

license, or any regulation which would impede them "in the performance of their duties, as required by this act." The "steamer piloted as herein provided" was the steamer required to be so piloted, and it was upon such steamer that no pilot charges were to be levied by state authority. The same construction must be given to these provisions as reënacted in § 4444 of the Revised Statutes, where the words "piloted as provided by this Title" take the place of the words "piloted as herein provided." The Federal requirement as to port pilotage of coastwise sea-going steam vessels was applicable only to those "not sailing under register;" as to those which sailed under register, there were no port pilots provided for, and the regulation of pilotage in the case of such vessels entering and leaving the state ports was left to the States. The fact that a vessel of this sort had on board a pilot holding a Federal license when the services of such a pilot were not required by the Federal law, did not oust the State of the power to compel the use of a state pilot.

Nor was the proviso in § 51 of the act of 1871 (now the last sentence of R. S. § 4444) a restriction of this state authority. This proviso was as follows:

"*Provided, however,* That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

Manifestly, this did not enlarge the scope of the requirement as to Federal pilotage contained in the preceding portion of the section. The words "other than coastwise steam-vessels" did not mean that the State could not require port pilots for coastwise sea-going steam vessels sailing under register. For this would be to impute to Congress the intent to withdraw from the State the power to

act in the cases omitted from the Federal regulation. Even on the construction of the statute for which the appellees contend, it is conceded that "a coastwise steam vessel sailing under register which is not piloted by a federal pilot may be compelled by the State to take a State pilot when entering or leaving port." And, if in any case the vessel might be forced to take a pilot under the state law, it would necessarily follow that it is not excluded by the proviso from the operation of that law. The natural interpretation of the proviso is that it was intended to prevent misapprehension as to interference with local rules—to declare the continued efficacy of those rules when not in conflict with the Federal authority—and not to introduce an independent limitation of state power over port pilotage with respect to registered steam vessels, where the Federal control had not been asserted. The enacting clause and the proviso are to be read together "with a view to carry into effect the whole purpose of the law." *White* v. *United States*, 191 U. S. 545, 551. So read, the words "other than coastwise steam-vessels" must be deemed to refer to those "not sailing under register," to which the requirement of Federal pilots applied. The same meaning must be ascribed to this clause as it now appears in § 4444 of the Revised Statutes, taken as it must be in connection with § 4401.

The statute was thus construed in *Murray* v. *Clark* (1874), 4 Daly, 468, affirmed, 58 N. Y. 684, where a steamer sailing under register between New York and New Orleans, and touching at a foreign port as was her privilege, was held to be subject to the law of the State of New York as to pilotage in entering the port of New York, although at the time she was under the control of her master who was a pilot licensed by the Federal inspectors. In *Joslyn* v. *Nickerson* (1880), 1 Fed. Rep. 133, while it was held that a libel for pilotage could not be sustained, for the reason that the law of Massachusetts,

in question, was not by its terms applicable, Judge Lowell said (page 135): "This statute" (referring to the Federal act of 1866) "has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St., § 4401; *Murray* v. *Clark*, 4 Daly, 468, affirmed, 58 N. Y. 684. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. St., § 4444." In *Spraigue* v. *Thompson*, 118 U. S. 90, 96, where a claim for pilotage under the law of Georgia was disallowed, the steamer "was a coastwise sea-going steam vessel," and "was not sailing under register." In *Huus* v. *New York & Porto Rico Steamship Co.*, 182 U. S. 392, 394, after quoting from §§ 4401 and 4444 of the Revised Statutes, the court said: "The general object of these provisions seems to be to license pilots upon steam vessels engaged in the *coastwise* or interior commerce of the country, and at the same time, to leave to the States the regulation of pilots upon all vessels engaged in *foreign* commerce." There, the steamer was enrolled and licensed for the coasting trade under the laws of the United States and was engaged in trade between Porto Rico and New York after the treaty of cession. It was held that she was not within the pilotage laws of New York.

The provisions of the Political Code of the State of California, set forth in the certificate, do not apply to coastwise sea-going steam vessels "not sailing under register" and are not in conflict with the statutes of the United States. Their enforcement is simply a recognition of the limits which Congress has thus far set to the exercise of the unquestioned Federal power. The criterion is not whether the stops of registered vessels at foreign ports may be deemed en route between domestic ports, and is not to be found in the length of such stops or in the relative amount of foreign trade. The statute made the dis-

tinction, in the light of the well-known conditions of trade which existed at the time of its enactment, between coastwise sea-going steam vessels, not sailing under register, and those which did sail under register. Whether or not it is wise to establish Federal rules as to port pilotage for the registered vessels exempted from this regulation is a question for Congress to determine.

We conclude that each one of the questions certified should be answered in the negative.

It is so ordered.